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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

CONCERNED JEWISH YOUTH,

Petitioner,

-against-

ROBERT J. McGUIRE, in his official capacity as Police Commissioner of the City of New York, EDWARD KOCH, in his official capacity as the Mayor of the City of New York, and the NEW YORK CITY POLICE DEPARTMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Are prior restraints imposed by the New York City Police Department which:

(a) completely ban the use of amplified sound on the New York City block containing the Missions of the Union of Soviet Socialist Republics and the Ukranian Soviet Socialist Republic ("Soviet Mission") in violation of a New York City ordinance mandating the police to grant a permit allowing the use of such equipment;

(b) prohibit peaceful and orderly demonstrations by Concerned Jewish Youth ("CJY") in front of the Soviet Mission; and

(c) limit the number of members of CJY who may participate in peaceful and orderly demonstrations on the Soviet Mission block to twelve persons in a cordoned off area across the street and

down at the end of the block on which the Soviet Mission is located individually and cumulatively valid under the First and Fourteenth Amendments to the United States Constitution?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

Concerned Jewish Youth ("CJY") petitions this Court, pursuant to Rule 19 of the Rules of this Court, to review the decision and order of the United States Court of Appeals for the Second Circuit (Moore and Waterman, J.J.; Mansfield, J. dissenting), rehearing denied August 28,

1980, affirming the order and judgment of the United States District Court for the Southern District of New York dismissing the Complaint herein and upholding prior restraints on CJY's freedom of speech under the First Amendment. The appeals court decision is appended hereto at A-1 to A-55 and is reported at 621 F.2d 471 (2d Cir. 1980). The district court decision is appended hereto at A-56 to A-91 and is reported at 469 F. Supp. 1296 (S.D.N.Y. 1979).

JURISDICTION

The judgment of the Court of Appeals was rendered and entered on March 27, 1980 and rehearing was denied on August 28, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This proceeding involves the First and Fourteenth Amendments to the Constitu-

tion of the United States (A-92 to A-93),[1] the Act for the Prevention and Punishment of Crimes against Internationally Protected Persons, 18 U.S.C. § 112 (1976) (A-94 to A-98), Section 435-6.0 of the Administrative Code of the City of New York (1976) (A-99 to A-111) and Section 435 of the New York City Charter (1976) (A-112 to A-114).

STATEMENT OF THE CASE

This action under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 (1979) seeks injunctive relief prohibiting the New York City Police Department from continuing to impose prior restraints upon peaceful demonstrations in the New York City block (East 67th Street between Lexington and Third

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[1] The pertinent text of the constitutional provisions, treaties, statutes, ordinances and regulations involved in this proceeding is set forth in the appendix and references to such text in this petition for a writ of certiorari are designated as "A-__ to A-__".

Avenues) on which the missions to the United Nations of the Union of Soviet Socialist Republics and the Ukrainian Soviet Socialist Republic (the "Mission") are located.

The prior restraints are threefold: (i) amplified sound equipment at any decibel level is banned from the Mission block at all times; (ii) all demonstrators are banned from demonstrating in front of the Mission or anywhere along the sidewalk on the Mission side of the block; and (iii) demonstrations on the block are limited to twelve demonstrators who are placed behind police barricades in an area across the street and down the block from the Mission.

Facts

CJY is a membership association founded in 1975 and headquartered at Queens

College in Flushing, New York. (Tr. 3-5.)[2] The group is composed of approximately 300 students of whom some fifty to seventy are active members. Its purposes include combatting anti-Semitism, helping the Jewish poor and working for the cause of Soviet and Arab Jewry. CJY is differentiated from other groups such as the Jewish Defense League by its emphasis on preserving Judaic heritage through educational activities and non-violent demonstration.

1. Imposition of Prior Restraints and Denial of Sound Permits to CJY.

CJY twice sought to protest on the sidewalk before the Mission to condemn the Soviet Union's treatment of Jews. On each occasion, it applied at the 19th precinct station of the New York Police Department

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[2] References to the transcript of the hearing held in the district court are designated as "Tr.".

for a permit, pursuant to Section 435-6.0 of the New York City Administrative Code (the "Administrative Code") to use sound amplification equipment in connection with the planned demonstration.

CJY informed the police that it desired to hold a rally on the sidewalk directly in front of the Soviet Mission with a group of twenty-five to thirty people and to utilize sound equipment in the manner provided and at the times permitted by the Administrative Code. (Tr. 21, 23.) The police inquired and were assured that CJY would be peaceful. (Tr. 24.) The police then read the so-called "Dollinger decision" to CJY, denied a sound permit for the Mission block, and stated that in accordance with the numerical restrictions set out in the Dollinger decision, CJY would only be allowed to have twelve or

thirteen people in a makeshift "bull pen" on the corner of the north side of East 67th Street, near Third Avenue. (Tr. 145.) The police did issue a sound permit to CJY, but only for use in an "overflow" area located on East 67th Street between Lexington and Park Avenues, nearly a block away from the Soviet Mission. A map showing the Mission block area is annexed hereto (A-115).

2. The Dollinger Decision.

The "Dollinger decision" referred to by the police is an order entered in a civil action by the late Justice Isidore Dollinger of the New York State Supreme Court in 1971, some four years before CJY was founded.[3] The order preliminarily

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[3] Millan House Inc. et al. v. Murphy et al., Civ. No. 10560/1971 (Sup. Ct., N.Y. County, July 6, 1971) (hereinafter the "Dollinger decision").

enjoined certain groups[4] from picketing in the Mission block area, except that twelve people who would be subject to identification and "reasonable search" could picket in the "immediate vicinity of the Soviet Mission." The Dollinger decision also enjoined the groups from, inter alia, using amplified sound, engaging in loud chanting, booing, shouting, stamping of feet, clapping of hands, singing and sounding of horns.

3. Enforcement of the Dollinger Decision Against All Demonstrators.

The district court below found that the police made no independent determina-

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[4] The Jewish Defense League, Student Struggle for Soviet Jewry, the Ukranian National Organization of U.S., the Ukranian Student Organization, the Polish American Congress, the Lithuanian Action Committee and the Young Americans for Freedom, their agents, members and those acting under their direction and control and in concert and conjunction with them.

tion that demonstrations by other groups should be limited to twelve demonstrators in the Soviet Mission block or that sound equipment could be banned. 469 F. Supp. at 1299. (A-66). Captain Selvaggi of the 19th Precinct testified that while he was familiar with the mandatory requirements of the Administrative Code dealing with the issuance of sound permits, the police nonetheless uniformly deny such permits for the Mission block solely because of the Dollinger decision:

> Q. Are you familiar with Section 435-6.0 of the Administrative Code, which is the explicit section of the Code dealing with the issuance of sound permits?
>
> A. Yes, we are familiar with this section.
>
> Q. Is it your interpretation that this ordinance does not apply to the block between Lexington and Third on East 67th Street.
>
> A. It's my interpretation that the Dollinger decision does apply and it prohibits using amplified sound in a block and that

is why those permits are refused.

* * *

Q. Did you make any determination whether or not CJY was listed as a party to the Dollinger injunction in denying them a permit?

A. I had a list of the people who were named in that original Dollinger decision, and of course CJY was not in that list.

(Tr. 153-54.)

4. Police Failure to Make Any Individual Assessments.

The police, moreover, neither assess the likelihood that any particular group seeking to demonstrate in front of the Soviet Mission will be violent, nor take guidance from Section 5 of the Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons, 18 U.S.C. § 112 (1978). (Tr. 145, 151.) That statute allows peaceful demonstrators to march in front of a foreign government

mission located outside the District of Columbia and only imposes criminal penalties if a demonstrator intimidates, coerces, threatens or harasses a foreign official or official guest or attempts such conduct within one hundred feet of a mission. Indeed, Captain Selvaggi testified that he incorrectly instructed his men that the statute flatly prohibited all demonstrations within one hundred feet of a foreign mission, regardless of intent. (Tr. 151.)

5. The Truncated June 1978 CJY Demonstration.

On June 13, 1978, sixteen CJY members attempted to demonstrate at the Soviet Mission. (Tr. 26.) The twenty policemen present decreed that only twelve of the sixteen demonstrators could enter the block, that they would be confined to the "bull pen," and that their sound device had to be kept outside the block. (Tr.

28.) The district court found that "[t]he demonstration was peaceful and orderly." 469 F. Supp. at 1298. (A-62).

CJY concluded from this experience that "the visual impression of 12 people standing on the corner is nothing compared to in front of the building" (Tr. 33), and that:

> It's hard with 12 people penned in to make believe that you are actually going to have an impact and not to feel that your voices aren't getting anywhere but to feel that you are just speaking to each other.

(Tr. 70.)

6. The Violence that has Occurred at the Soviet Mission is not Attributable to CJY.

To somehow justify their broad restraints, the police attempted to show that other groups, principally the Jewish Defense League ("JDL"), were prone to violence.

A detective testified that he had infiltrated the JDL in 1970, prior to both

the Dollinger decision and the formation of CJY (Tr. 81-83, 88), and that "we would deliberately goad the [JDL] demonstration[s] into violence." (Tr. 84.) An investigator added that the police had identified the FALN, JDL and antiCastro Cubans as groups who would attach themselves to "large scale demonstrations" in order to plant bombs. He admitted, however, that such groups would not utilize small demonstrations for such purposes. (Tr. 93.) On appeal, the police cited a clandestine bombing of the Mission by anti-Castro Cubans. The police affirmed, however, that the Mission had been bombed only on this one occasion and that a bomb had never been planted during a demonstration. They further confirmed that CJY had no part in these events. (Tr. 90, 104.)

Furthermore, the police, as shown by their own Unusual Occurrence Reports, have

not hesitated to employ the standard practice of making arrests in cases of actual or prospective violence. Those reports also confirmed that it is in demonstrations of a larger scale than that proposed by CJY that violence, principally involving JDL, is far more likely to occur.

The police also attempted to portray CJY as prone to violence. The district court, however, recognizing the futility of the attempt, observed that "nobody has even begun to suggest that CJY is an organization that engages in these nefarious practices" (Tr. 106-107) and characterized CJY as "an organization of nice young men from Queens, whose purposes have a very therapeutic appeal." (Tr. 113.)[5]

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5 At the district court hearing, the police endeavored to depict CJY as disposed to violence by recounting the arrest of a CJY member for displaying a banner and using a bullhorn at a tennis
[Footnote continued]

Many people walk in front of the Soviet Mission every day. But if they carry a banner protesting Soviet treatment of Jews or otherwise attempt to speak out, they are confined to a "bull pen," limited to twelve in number and denied the use of sound equipment on the Mission block, regardless of their intent to act peacefully,

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5 [Footnote continued]

match. (Tr. 62.) No violence was associated with this incident, however, and the charge was dropped. (Tr. 75-76.) The police also cited a newspaper report that a CJY member had overturned a table manned by sympathizers of the Palestine Liberation Organization. (Tr. 68.) Informed at the hearing that this description of the incident was erroneous, the police dropped that line of questioning. (Tr. 69.) Consequently, there was no evidence before the district court to establish that CJY had been previously responsible for or was presently prone to violence. The presumption of the majority of the Court of Appeals, that the five members of CJY (10%) who might be members of the JDL or other violent groups endorse violence, was contrary to the observations of the district court cited in the text.

regardless of whether they have a history of violence and regardless of whether they are subject to the Dollinger decision.

7. The Proceedings Below.

Judgment dismissing CJY's complaint was entered by the district court after CJY's motion for a preliminary injunction was denied and the hearing held thereon deemed to constitute the trial on the merits. In upholding the restraints, the district court merely employed a balancing test, never once determining if the police had any legislatively granted authority to impose them or addressing the police failure to comply with the Administrative Code in refusing to issue a sound permit for the Mission block.

On appeal, the majority upheld the restraints terming them "comparatively minor." It interpreted Section 435 of the New York City Charter to authorize re-

straints on the situs of the demonstration and on the number of demonstrators. The majority also relied on the violence caused by others and the speculation that violent persons might attempt to infiltrate a CJY demonstration in finding the restraints proper. With respect to the ban on sound equipment, the majority ruled that the police need not obey, but only need consider, the Administrative Code provisions mandating the issuance of a permit.

In dissent, Judge Mansfield noted that the streets are traditional places for demonstrations and that this Court has condemned broad based restraints on street and sidewalk picketing where the police did not prove that a less restrictive and more narrowly tailored restraint could not be formulated. Since the district court had not found that such a showing had been made, since the record disclosed the avail-

ability of less restrictive alternatives, and since administrative convenience has no place in First Amendment analysis regarding demonstrations at such traditional demonstration sites, Judge Mansfield reasoned that the restraints should have been enjoined.

Judge Mansfield also noted that the restraints at issue here impact not only CJY, but every person who, like CJY, would seek to demonstrate peacefully in the Soviet Mission block including those who would follow the President's plea to demonstrate against the Russian invasion of Afghanistan.

He further observed that the actual source of these restraints was the Dollinger decision which is not applicable to CJY. He pointed out that § 435 of the New York City Charter, relied on by the majority and the police as authorizing these

restraints, had been interpreted by the courts of the State of New York not to authorize such restraints and constitutionally could not be interpreted otherwise.

Judge Mansfield also found that the absolute ban on sound equipment imposed by the police on the Mission block clearly violates § 435-6.0 of New York City's Administrative Code. That section obligates the police to issue sound permits under specified conditions with which CJY had agreed to comply. Replying to the majority's suggestion that the police gave "tacit consideration" to this ordinance, he stated the obvious: "Surely the police must do more than give tacit consideration to the governing law -- they must <u>follow</u> it." 621 F.2d at 482. (A-53).

REASONS FOR GRANTING THE WRIT

The implications of the ruling below and of the unsatisfactory analysis upon

which that holding was reached transcend the interests of the parties litigant and strike deeply at "the central position of free expression in the constitutional scheme." L. Tribe, American Constitutional Law 582 (1978). Use of the streets "for purposes of assembly, communicating thoughts between citizens, and discussing public questions . . . has, from ancient times, been a part of the privileges, immunities and liberties of citizens." Hague v. C.I.O., 307 U.S. 496, 515 (1939).

Police violation of a statute to suppress the use of sound equipment on a public sidewalk near the target of a demonstration is unknown to the cases and is to be condemned rather than upheld. The police practice of barring all peaceful demonstrators from demonstrating on the sidewalk in front of their target and limiting the number of demonstrators on a

city block to a mere few far below the capacity of the block to accommodate them sharply conflicts with the decisions of this Court and of the District of Columbia Circuit and is without constitutional statutory authority.

To be sure, the right to demonstrate may be limited through provisions to enforce compelling governmental concerns appropriately reflected in legislation narrowly tailored to reflect those concerns. But the restraints here enjoy no such authorization, are flatly contrary to the existing ordinance with respect to the use of sound equipment, and go far beyond what Congress, in discharging the United States' treaty obligation to protect missions, has deemed necessary. The holding of this case, therefore, raises the highly disturbing notion that the First Amendment rights of citizens of this country are of

only passing concern whenever it can be shown that others, clandestinely or in much larger demonstrations than sought here, have resorted to violence. Were that the case, the right of assembly would be meaningless.

Certiorari should be granted to review this untenable result and the disturbing implications it portents before the doctrine announced below spreads further. Already, one district court, noting that the decision below has been "much criticized", has, nevertheless, been compelled to follow it. ISKON v. City of New York, No. 79 Civ. 1118 (S.D.N.Y. August 25, 1980). This Court should decide if the First Amendment is to be so cavalierly treated.

I. THE DECISION BELOW, IN SUSTAINING THE BAN ON SOUND EQUIPMENT ON THE MISSION BLOCK, SHARPLY CONFLICTS WITH PRIOR HOLDINGS OF THIS COURT AND RAISES DISTURBING LIMITATIONS ON FREEDOM OF SPEECH REQUIRING REVIEW BY THIS COURT.

There can be no doubt, and this Court has ruled, that the use of amplified sound, whether it be employed in a political campaign or a demonstration, is a form of speech protected under the First Amendment. Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948). "Loudspeakers are today indispensible elements of effective public speech." Saia v. New York, 334 U.S. at 561. Reasonable restraints adopted by state legislatures or city councils as to the time, place and manner of the use of sound equipment have been upheld, Kovacs v. Cooper, but the issue here goes far beyond examining legislation crafted to meet constitutional concerns and yet prevent abuse.

This case brings to the fore the issue of whether the police by their own volition may construct a prior restraint of freedom of speech which violates a duly enacted city ordinance permitting the use of sound equipment.

A. In Denying a Sound Equipment Permit to CJY, the Police Violated the Governing Ordinance.

Both the majority below and the district court conceded that the police violated Section 435-6.0 of the Administrative Code in denying sound permits to CJY. That ordinance expressly mandates the police to issue a permit for the use of sound equipment at times and decibel levels with which CJY has repeatedly affirmed it will comply.

The ordinance contains no exception for missions. Rather, it prohibits use of sound equipment between 10:00 p.m. and 9:00 a.m., within 500 feet of a school

during school hours or a place of worship during hours of worship and within 500 feet of a hospital.[6] The ordinance further prohibits such equipment only where the Commissioner determines that vehicular or pedestrian traffic is such, or that conditions of overcrowding or street repair exist, so that the use of sound equipment will be hazardous to vehicular or pedestrian traffic or deprive the public of use of the street. But, as the district court found, "the defendants have offered no evidence that the Commissioner made any of the determinations specified in the Code." 469 F. Supp. at 1303. (A-85).

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6 Since the Administrative Code precludes the use of sound equipment from 10 p.m. to 9 a.m. the concern voiced by the district court for late night use of such equipment is irrelevant here. In fact, CJY affirmed that it has no desire to utilize such equipment while people sleep. (Tr. 28.)

Indeed, the ban on sound equipment sharply distorts the comprehensive anti-noise code enacted by the City of New York. Designed, inter alia, to prohibit certain "unnecessary noise," including that from sound signal devices, animals, construction activities and sound reproduction devices, the New York City Noise Control Code, §§ 1403.3-1.01 et seq. of the Administrative Code of the City of New York expressly exempts sound equipment employed under the permit system established in Section 435-6.0 discussed above. See § 1403.3-4.03(a). The City attested that the mandatory permit system was to be obeyed when, in 1979, it created ambient noise quality zones and confirmed that the decibel limits established did not apply to such sound equipment. Local Laws of the City of New York, No. 64, § 1403.3-6.01(b)(1) (Nov. 7, 1979).

B. Prior Restraints on Freedom of Speech which Violate the Express Terms of an Ordinance Allowing the Speech Should be Condemned.

Police violation of a duly enacted ordinance to impose prior restraints on freedom of speech is an anomaly unknown to the cases that have come before this Court. It is through legislation duly enacted by elected reprepresentatives that the community establishes its balance between the rights of demonstrators and the privacy interests of its residents. See Niemotko v. Maryland, 340 U.S. 268, 275-76 (1950) (Frankfurter, J. concurring). For the police to unilaterally disrupt that balance is unheard of and flatly violates the precepts established by this Court in Grayned v. City of Rockford, 408 U.S. 104 (1972), and Kovacs v. Cooper affording deference to narrowly drawn anti-noise ordinances. Not even A Quaker Action Group

v. Morton, 516 F.2d 717, 734 (D.C. Cir. 1975), the sole case cited by the majority below on this point, sanctioned such behavior. There, the Department of the Interior had, pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. (1976), adopted 36 C.F.R. § 50.19(d)(2) (1973) which prohibited the use of sound equipment on the sidewalk in front of the White House, but permitted the use of such equipment in Lafayette Park immediately across the street. Significantly, no statute or ordinance contradicted the regulation. The Quaker Action court, therefore, did not sanction police violation of a statute or ordinance to restrain freedom of speech.

The anomaly that this case presents is also shown by the ban on the use of such sound equipment even in the bull pen, an area situated somewhat akin to Lafay-

ette Park in the Quaker Action case in that it is across the street from, and in the same block as, the front gate of the target of the demonstration. The demonstrators in the Quaker Action case were permitted to use sound equipment in Lafayette Park and the Quaker Action Court found that this afforded "adequate protection for First Amendment communication." 516 F.2d at 734. Here, however, the use of sound equipment as authorized by the Administrative Code is precluded by the banning of sound equipment from the entire Mission block.

This Court has never sanctioned such a result even when considering restaints on sound equipment contained in an ordinance. In Kovacs v. Cooper, this Court carefully observed that the Trenton, New Jersey ordinance banning sound equipment from vehicles had been limited by the New

Jersey courts to prohibiting only "'loud and raucous noises'" (336 U.S. at 83) and accordingly upheld it on exactly that ground, stating that the First Amendment does not bar an ordinance restraining speech in a "loud and raucous tone". 336 U.S. at 87. In Grayned v. City of Rockford, 408 U.S. 104 (1972), this Court upheld an ordinance which barred willful noisemaking tending to disturb a school but was limited in time to the hours the school was in session. That limitation was decisive in sustaining the ordinance's validity against charges of overbreadth:

> Far from having an impermissibly broad prophylactic ordinance, Rockford punishes only conduct which disrupts or is about to disrupt normal school activities. . . . Peaceful picketing which does not interfere with the ordinary functioning of the school is permitted.
>
> * * *
>
> The antinoise ordinance imposes no such restriction on expressive activity before or after the school

> session, while the student/faculty "audience" enters and leaves the school.

408 U.S. at 119-20.[7]

The police practice here enjoys none of the redeeming features relied on in Kovacs and Grayned. Unlike the ordinances there, the police are not placing limited constraints on the time at which or manner in which sound equipment may be used. Their practice effectively bars the use of sound equipment, at all times and at any decibel level, to convey CJY's message to the target of the demonstration. It is the duly enacted Administrative Code which embodies the type of limitations relied on

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[7] See also, Wisconsin Student Ass'n v. Regents, 318 F. Supp. 591 (W.D. Wis. 1970) (enforcement of an ordinance barring all sound equipment from university buildings preliminarily and permanently enjoined). Accord, Maldonado v. County of Monterey, 330 F. Supp. 1282 (N.D. Cal. 1971); Phillips v. Township of Darby, Pa., 305 F. Supp. 763 (E.D. Pa. 1969).

in Kovacs and Grayned -- the Code with which CJY desires to comply and which the police, ironically, choose to violate.

C. The Restraint on Sound Equipment is Unsupported by Any Governmental Interest Articulated by Congress in Discharging the United States Obligation to Protect Foreign Missions.

This blatant violation of the Administrative Code is compounded by the failure of the police and the majority below to point to an appropriately manifested governmental interest which the police policy, in the words of this Court, is "narrowly tailored to further. . . ." Grayned v. City of Rockford, 408 U.S. at 116-117. They rely on the Vienna Convention of Diplomatic Relations, 23 U.S.T. 3227 (1961) and Section 16 of the Headquarters Agreement between the United Nations and the United States. 61 Stat. 758 (1947). But Congress, in discharging the United States' obligations under that

treaty and agreement in enacting 18 U.S.C. § 112 (1976),[8] omitted any ban or limitation on sound equipment. Congress, the body charged with articulating such concerns, did not identify any governmental interests which justify the ban on sound equipment imposed here by the police.

D. The Police Policy is Discriminatory.

Ignoring their violation of the Administrative Code and the lack of Congressional concern regarding sound equipment, the police argue that sound equipment is not really banned because it is permitted at the "overflow site" located in the next block, East 67th Street between Lexington and Park. This answer is no answer. The overflow site cannot be seen from the Mis-

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[8] Act for the Protection of Foreign Officials and Official Guests of the United States, Pub. L. No. 92-539 201, 86 Stat. 107 (1972), as amended and codified in 18 U.S.C. § 112 (1976).

sion and demonstrators using sound equipment at reasonable decibel levels simply cannot be heard.

Moreover, the police policy is discriminatory in two respects: First, while other residents and missions in New York City are protected by the decibel and time limitations of the Administrative Code, only the Soviets are sheltered from sound equipment utilized in the manner authorized by the Administrative Code. Second, the use of sound equipment at the so-called overflow site at a level which could be heard at the Mission would deafen the residents of the two Lexington Avenue apartment houses situated between the Mission and the overflow area. The police have yet to explain, and the courts below failed to discuss, any justification for subjecting those citizens to the burden of demonstrations directed toward the Mission.

E. The Reasoning of the Majority Below is Seriously Flawed.

The majority below claimed that the police gave "tacit consideration" to the Administrative Code and that the restraints imposed are necessary in highly urban New York City. As to the first point, the district court found to the contrary, stating, "the prohibition of the use of sound equipment appear[s] to have been derived solely from the 1971 state court injunction." As to the majority's second point, the New York Court of Appeals has held that a nearly identical sound equipment ordinance to Section 435-6.0 of the Administrative Code enacted by the City of Buffalo, while sufficiently specific, was unconstitutional on its face for the reason, inter alia, that it required a five day waiting period. People v. Taub, 37 N.Y.2d 530 (1975).

The majority decision thus gives the New York police sole authority to impose stricter restraints on the Mission block than New York City intended and than the New York Court of Appeals has found appropriate for a similar New York urban environment.

Certiorari should be granted to review the highly disturbing holding below concerning the absolute ban of sound equipment on the Mission block. Freedom of speech should not be unilaterally restrained in violation of a city ordinance without this Court's full consideration.

II. THE DECISION BELOW, IN SUSTAINING THE BAN ON DEMONSTRATIONS IN FRONT OF THE MISSION AND THE LIMITATION OF THE NUMBER OF DEMONSTRATORS TO TWELVE, FURTHERS CONFLICTS WITH PRIOR HOLDINGS OF THIS COURT AND SANCTIONS VIOLATIONS OF CJY'S FIRST AMENDMENT RIGHTS.

Similarly contrary to this court's prior holdings is the ruling of the major-

ity below sanctioning the police ban on demonstrations on the sidewalk in front of the Mission and the limitation of twelve demonstrators on the entire Mission block. What the majority has done here is to seriously abridge the favored place that the First Amendment right to demonstrate has traditionally enjoyed.

This Court has repeatedly affirmed that the starting place in a First Amendment analysis is recognition that municipal regulation of First amendment rights, regardless of whether it be "content neutral," must be narrowly tailored to limit the time, manner and place of the exercise of such rights to the minimal degree necessary to protect compelling governmental interests. See, e.g., Grayned v. City of Rockford, 408 U.S. 104 (1972); Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972); Gregory v. Chicago,

394 U.S. 111 (1969); Adderley v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Kunz v. New York, 340 U.S. 290 (1951); Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948).

Those who would regulate the exercise of first amendment freedoms thus shoulder a weighty burden of justification. E.g., Cohen v. California, 403 U.S. 15, 21 (1971). And in cases such as this which involve a prior restraint on expression, see Kunz v. New York, 340 U.S. 290, 293 (1951); Saia v. New York, 334 U.S. 558, 559 (1948), the proponent of the restraint must overcome a "heavy presumption" of invalidity. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 181 (1968);

Alderman v. Philadelphia Housing Authority, 496 F.2d 164, 168-69 (3d Cir. 1974) cert. denied, 419 U.S. 844 (1974). As this Court has ruled,

> In every case, therefore, where legislative abridgment of the rights [of freedom of speech] is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.

Schneider v. State of New Jersey, 308 U.S. 147, 150-51 (1939) (footnote omitted; emphasis added). See also, Women Strike For Peace v. Morton, 472 F.2d 1273, 1282-83 (D.C. Cir. 1972).

These precepts, wholly ignored by the majority below, are especially significant in cases involving demonstrations in a public forum such as a street or sidewalk. Hague v. C.I.O., supra. Justice

Blackmun, writing for this Court in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), made exactly this point in distinguishing streetcars from streets and sidewalks. He wrote that "[t]hese situations are different from the traditional settings where First Amendment values inalterably prevail," and that in that case "we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare." 418 U.S. at 302, 303. Accordingly the "reasonable legislative objectives advanced by the city in a proprietary capacity" were held to prevail. 418 U.S. at 304.

Thus, in cases involving a public forum, this Court has ruled that "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Southeastern Promo-

tions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975), quoting from Schneider v. State, 308 U.S. 147, 163 (1939). And in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757, n.15 (1976), this Court reaffirmed that "[w]e are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is."

In the public forum cases, this Court has repeatedly held, therefore, that freedom of speech can only be restrained in the least restrictive manner necessary to accommodate a compelling public purpose. See e.g., Grayned v. City of Rockford; Shelton v. Tucker, 364 U.S. 479 (1960); and cases cited supra. As Professor Tribe has distilled this line of authority:

> . . . [W]henever it can be demonstrated that the result of the gov-

> ernment's rule or policy is to limit in some significant degree the ease or effectiveness with which a speaker can reach a specific audience with a particular message, the government should lose the case unless it can establish that an important public objective unrelated to the message would be sacrificed by any less restrictive alternative.

Tribe, supra at 686.

A. Blanket Removal of Peaceful Demonstrators From the Target Significantly Diminishes Speech.

These long established rules assume particular relevance in attempts to bar all peaceful demonstrators from the public streets and sidewalk in front of and adjacent to the target of the demonstration. It is the target that the demonstration is directed toward and it is the target that provides the public focus for the demonstration. Labor union picketing, for example, conveys less of a message and less of a focus when removed from the plant where the grievance lies. The courts have

thus consistently recognized the devastating impact on removing all demonstrators from the street next to the target. See e.g., Grayned v. City of Rockford, supra (peaceful demonstrations permitted directly in front of a school during school hours); A Quaker Action Group v. Morton, 516 F.2d 717 (D.C. Cir. 1975) (demonstrations on sidewalks directly in front of the White House and executive office buildings); Greenberg v. Murphy, 329 F. Supp. 37 (S.D.N.Y. 1971) (demonstrators permitted to picket at the side entrance to the United States Mission to the United Nations and small groups permitted to approach the front entrance to present petitions).

Perhaps the need to demonstrate in close proximity to the target was never more eloquently put than by the demonstrator in Police Department of the City of

Chicago v. Mosley, 408 U.S. 92 (1972), in his testimony quoted by this Court in upholding his right to demonstrate:

> when I was across the street from the school, 150 feet away, you cannot hardly see me. The question that all of the people asked me was, "Where is the school located?" They don't even see the school across the street, you know. So, what it does, it takes away a certain amount of the effectiveness . . . . [W]hen I am across the street, I am sort of out of the picture . . . .

408 U.S. at 93, n.1.

In like manner, the record in this case clearly shows that by limiting CJY to twelve demonstrators and by placing them across the street and down the block, some 120 feet away, the police have quite effectively removed them from the "picture." As CJY's co-chairmen stated:

> If we have 12 people on the corners and the 12 of us were shouting and we felt really pitiful and we felt our voices weren't getting us anywhere, if you have people in front of the mission, even the 12, which I personally think is much too small a number to do anything effectively,

> but even 12 people in front of the mission would be heard by the people inside.

(Tr. 32-22.)

B. Permitting only Twelve Demonstrators on a City Block Diminishes Speech.

Similarly, constricting the number of demonstrators to a mere handful, in a city block that could obviously accomodate more, severely impacts the message the demonstrators attempt to convey. It gives the inaccurate impression that their views are shared by only a few and stifles their desire to demonstrate again. CJY found that to be the case here:

> the 11 people with me [in the bullpen] were not very much inclined to think that the rally was a success and want to do it again. They were kind of embarrassed.

(Tr. 35.) The impact of the police restrictions as articulated here by CJY accords with the general finding of the court in A Quaker Action Group v. Morton,

362 F. Supp. 1161 (D.D.C. 1973), aff'd, 516 F.2d 717 (D.C. Cir. 1975):

> Large demonstrations play an "important role" in the exercise of First Amendment rights. A large demonstration is likely to be a more effective communication device than is a small demonstraion. The size of a demonstration bears a relationship to the communication of the content of the message. The larger the demonstration, the greater the likely coverage and exposure by the news media.

362 F. Supp. at 1167.

Accordingly, numerical limitations on peaceful demonstrations have been rarely imposed. Only in the Quaker Action cases (A Quaker Action Group v. Morton, supra; A Quaker Action Group v. Hickel, 421 F.2d 1111 (D.C. Cir. 1969)) have we found express consideration of a numerical limitation, and there the Court enjoined enforcement of a regulation limiting the number of demonstrators on the sidewalk in front of the White House to 100 people and to 300 in Lafayette Park. The Court of

Appeals, upholding the preliminary injunction, ruled that 750 and 3,000 demonstrators could be accommodated in those respective areas, noting "the fact that plaintiffs wish to demonstrate in areas open to the public argues for their cause." 421 F.2d at 1116.

While this Court has not directly addressed a numerical limitation, it has repeatedly ruled that restraints on demonstrations are to be measured by the character of the site. E.g., Cox v. Louisiana, 379 U.S. 536 (1965). Such a formulation necessarily calls for assessment of the site's ability to accommodate demonstrators and to permit the number reached through that assessment to demonstrate in order to prevent the impact on speech and the inaccurate impression of lack of support for the cause noted above.

There can be no do doubt that more than twelve demonstrators can fit in the Mission block and, indeed, that the four additional CJY members who desired to demonstrate on June 13, 1978 could have been accommodated. In fact, the district court found that the police made no independent evaluation of the proper number, stating that "[t]he limitation of the number of demonstrators on the block to twelve . . . appear[s] to have been derived solely from the 1971 state court preliminary injunction." 469 F. Supp. at 1299. (A-66). Yet the majority below accepted the police failure to make an evaluation and the district court's failure to canvass less restrictive alternatives.

C. Congress Avoided These Restraints in Satisfying the United States Obligation to Protect Missions.

Congress, moreover, sought no such result even when it amended 18 U.S.C.

§ 112 in 1972, after the Dollinger decision and many of the violent incidents caused by others and referred to in the Unusual Occurrence Reports. As the legislative history explicitly states, the amendments were designed to "permit a direct discharge by the United States of its international obligations as a host country. . . ."[9]

Significant for purposes of this case is that Congress found it necessary to prohibit only those demonstrations within one hundred feet of a foreign mission which were mounted with the specific intent to coerce, harass or obstruct a foreign official.[10] Section 112 does not

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9 S. Rep. No. 92-1105, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News 4316, 4317.

10 The legislative history to the Act for the Prevention and Punishment of Crimes Against Internationally Protected Per-

[Footnote continued]

limit demonstrations organized for the legitimate purpose of exercising free expression. To the contrary, subsection (d) of § 112 states that:

> Nothing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States.

The 1972 Senate Report confirmed that § 112(d):

> . . . was added by the committee to express its deep concern to those judicial and executive officials to whom the administration has been en-

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10 [Footnote continued]

sons, Pub. L. No. 94-467 5, 90 Stat. 1997 (1976), which extended the protections of § 112 to certain quasi-official foreign guests, expressly notes that the term "willfully," as used in § 112, means "voluntarily and intentionally, and with specific intent to do something the law forbids. . . ." H.R. Rep. No. 94-1614, 94th Cong., 2d Sess. 6 n.10, 1976 U.S. Code Cong. & Admin. News 4480, 4484; S. Rep. No. 94-1273, 94th Cong., 2d Sess. 8 n.10 (1976).

> trusted to use all due care to see that legitimate expression and assembly has not been abridged. First amendment rights play an important role in a Free Society and care should always be exercised to see that their role is not diminished.[11]

A similar concern was voiced in the 1976 Senate and House Reports on the amendments.[12]

To rebut the plain statutory language permitting peaceful demonstrations within 100 feet of any mission, and the evident Congressional concern for preserving First Amendment rights, the majority below sought to advance Congressional support for these prior restraints by stating that the statute:

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[11] S. Rep No. 92-1105, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News 4316, 4328.

[12] See H.R. Rep. No. 94-1614, 94th Cong., 2d Sess. 6 n.9, 1976 U.S. Code Cong. & Admin. News 4480, 4484; S. Rep. No. 94-1273, 94th Cong., 2d Sess. 8 n.9 (1976).

> specifically left open the situation where local authorities might use stricter controls. See Pub. L. 92-539, 86 Stat. 1070, 1073, § 3 (1972); Pub. L. 94-467, 90 Stat. 1997, 2001, § 10 (1976).

621 F.2d at 475. (A-16).

This reading of the statute enjoys no support from its language. The pertinent sections state: "[L]aw enforcement powers [may] take appropriate action, such as effecting arrests, for Federal as well as non-Federal violations" (Pub. L. 94-467, § 10), and the section shall not ". . . relieve any person of any obligation imposed by any law of any State. . . ." (Pub. L. 92-539, § 3.) The statute thus merely provides that duly enacted state laws are not pre-empted and that appropriate police action after an offense has occurred is still permitted. The statute gives not a hint that Congress believed that prior restraints were necessary to protect foreign missions.

D. The Restraints are Overbroad.

Even in the absence of the guidance provided by 18 U.S.C. § 112 as to the type of protection appropriate for foreign missions, the police practice of keeping all demonstrations away from the Mission clearly is not narrowly tailored to safeguard the security and proper functioning of the Mission.

Specifically, were the CJY members who sought to demonstrate on June 13, 1978 permitted to appear in front of the Soviet Mission, the twenty policemen present could have stationed themselves between the demonstrators and the Mission. Were a bull pen required, one could have been established in front of the Mission, arranged near the curb so that there would be space for police and pedestrians between the bull pen and the eight foot iron fence girding the Mission. The police

also could have stationed themselves along the fence. Alternatively, as shown by the map of the Mission area (A-115), demonstrators could have been positioned on the portion of the sidewalk commencing a few feet west of the gate and running approximately sixty feet in the direction of Lexington Avenue, leaving the eastern portion of the sidewalk to afford completely unobstructed passage to and from the Mission; other demonstrators could have been positioned on open sidewalk across the street. The presence of the police along the perimeters of the demonstration as well as the presence of the police station house across the street would have assured security and given a visible warning that violence or harassment would not be tolerated -- an assurance and warning that could have been effectuated by the quick arrest of any

violent demonstrator. No consideration was given to these clearly less restrictive alternatives which would have allowed CJY to exercise its First Amendment rights.

E. The Right to Demonstrate is to be Judged on an Individual Basis and Not on the Basis of Conduct by Others.

The decision of the majority below also announces the anomalous holding that the potential that some groups may engage in violence justifies restraints on the world at large. This Court, however, has unreservedly held to the contrary.

In Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972), this Court addressed an ordinance prohibiting all non-labor union picketing at certain sites on the basis that violence often occurred. In holding the ordinance invalid, this Court ruled:

> Predictions about imminent disruption from picketing involve judgments appropriately made on an indi-

> vidualized basis, not by means of broad classifications, especially those based on subject matter.

408 U.S. at 100-101.

To be sure, the police cannot be asked to discount the possibility that an apparently peaceful group willing to comply with reasonable regulations might be goaded into action by an outsider, or be used as innocent cover for an individual act of violence, or even dissembling as to the peacefulness of its designs. However, "[i]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker v. Des Moines School District, 393 U.S. 503, 508 (1969). The precautionary measures to be taken, particularly with respect to the small demonstrations sought by CJY, appropriately involve the preparation and deployment of sufficient police officers to enforce the

law through arrest and indictment, if necessary, rather than across-the-board limitations that stifle small peaceful demonstrations.

F. Section 435 of the New York City Charter Does Not and Constitutionally Cannot Authorize the Restraints.

The police restraints further violate the First Amendment in that they either are unauthorized by legislation or have been adopted pursuant to a vague ordinance containing no standards governing police actions.

The majority below found authority for the restraints in Section 435 of the New York City Charter. But as this Court has held again and again, "the starting point in every case involving construction of a statute is the language itself." Touche Ross & Co. v. Redington, 442 U.S. 560, 570 (1979); Santa Fe Industries Inc. v. Green, 430 U.S. 462, 472 (1977); Ernst

& Ernst v. Hochfelder, 425 U.S. 185, 197 (1976); accord, United States v. Oregon, 366 U.S. 643, 648 (1961); Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947).

Here the relevant statutory language is plain; it gives the police power only to "preserve the public peace [and] disperse unlawful or dangerous assemblages and assemblages which obstruct the free passage of public streets, sidewalks, parks and places. . . ." The ordinance gives the police no express authority to impose any prior restraint and, indeed the language employed denies any such authority. It speaks, not in terms of preventing acts in the future but of dispersing those assemblages found to be unlawful, dangerous or obstructive. Thus, the New York courts have found that Section 435 did not grant authority to restrain demonstrations in the Mission block. People v.

Solomonow, 56 Misc. 2d 1050, 291 N.Y.S. 2d 145, 150 (Sup. Ct. N.Y. Co. 1968).

In addition, pursuant to its operative terms, Section 435 has no application to this case involving peaceful demonstrations by a limited number of people. The "dangerous" assemblage and blocking of traffic premised by the ordinance have not been found to be present here.

Furthermore, if the majority's holding that Section 435 vests the police with power to construct the restraints at issue was correct, then Section 435 violates this Court's admonition that statutes which purport to regulate freedom of speech must be "precise and narrowly drawn" and contain standards to guide the police in enforcing its terms consistent with the exercise of First Amendment rights. Edwards v. South Carolina, 372 U.S. 229, 236 (1963); accord, Shuttlesworth v. Birming-

ham, 394 U.S. 147, 150-51 (1969); Niemotko v. Maryland, 340 U.S. 268, 272 (1951). If Section 435 is intended to serve as the legislative basis upon which serious curtailment of First Amendment rights may be made, then it is a clearly overbroad and vague grant of undefined power leaving the police with unchecked discretion to do what they will.

The blanket removal of all demonstrators from the sidewalk in front of and adjacent to the Mission and the limitation on the number of demonstrators in the Mission block restrain speech, are far in excess of what Congress deemed necessary under its treaty obligations, are overbroad and are accomplished through an ordinance that either does not authorize them or is constitutionally infirm. Certiorari should be granted to consider these overbroad restraints and to deter-

mine whether the case should have been remanded to the district court with instructions to permit a reasonable number of demonstrators to demonstrate in front of or adjacent to the Mission.

CONCLUSION

For the foregoing reasons, and those set forth in the dissent below, it is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

s/

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The invaluable assistance provided in preparation of this petition for writ of certiorari by Mr. Lee H. Greene, J.D., School of Law (Boalt Hall) of the University of California, Berkeley is gratefully acknowledged.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 228 September Term 1979

Argued December 7, 1979

Decided March 27, 1980

Docket No. 79-7456

CONCERNED JEWISH YOUTH,

Plaintiff-Appellant,

-against-

ROBERT J. McGUIRE, in his official capacity as Police Commissioner of the City of New York, EDWARD KOCH, in his official capacity as the Mayor of the City of New York, and the NEW YORK CITY POLICE DEPARTMENT,

Defendants-Appellees.

BEFORE: WATERMAN, MOORE and MANSFIELD, Circuit Judges.

Appellant Concerned Jewish Youth sought a preliminary injunction and a

final order barring the New York City Police from enforcing restrictions on its demonstrations, because the restrictions infringed on the demonstrators' First and Fourteenth Amendment rights. The United States District Court for the Southern District of New York (Honorable Milton Pollack, Judge), denied the motion for the preliminary injunction and dismissed the complaint, finding that the restrictions on the number and location of demonstrators, and on the use of a sound device, were necessary to further a significant governmental interest.

We affirm.

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(Willkie Farr & Gallagher, John M. McEnany, Jeanne M. Luboja, of counsel), for Plaintiff Appellant.

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ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York, Katherine J. Trager, Jane E. Bloom, Michael H. Dolinger, Assistant United States Attorneys, of counsel, on Amicus Curiae Brief for the United States of America.

MOORE, Circuit Judge:

This appeal raises interesting questions of the extent to which the First Amendment rights of demonstrators may be subjugated to an overriding governmental interest. Appellant Concerned Jewish Youth ("CJY") sought declaration under 42 U.S.C. § 1983 (1976) that restrictions applied to its demonstrations in front of the Russian Mission in New York City violated the First and Fourteenth Amendments. CJY also sought an order preliminarily enjoining the New York City police from

restricting CJY's demonstrations. CJY now appeals from a judgment denying the motion for a preliminary injunction and dismissing the complaint (Honorable Milton Pollack, District Judge, Southern District of New York). Because no new evidence was to be adduced at trial, the District Court consolidated the hearing on the motion with the action on the merits and issued one decision disposing of both matters reported at 469 F. Supp. 1296.

CJY is a membership association founded in 1975 and headquartered at Queens College in Flushing, New York. The purposes of CJY are mainly to combat Anti-Semitism, to preserve and strengthen Judaic Heritage, and to work for the causes of Soviet and Arab Jewry. The group has maintained its independence from what CJY has characterized as other violence-oriented Jewish groups such as the Jewish Defense

League (JDL). (Tr. 6, 16, 74). Of the approximately 300 members of CJY, there are 50 to 70 active members. (Tr. 15). However, as one of the co-chairman of CJY testified, about 10% of these active members are also members of JDL or other activist groups and presumably endorse the more militant methods those groups employ. (Tr. 15, 16).

The members of CJY sought to protest on the sidewalk in front of the Russian Mission to publicize and condemn the Soviet Union's treatment of Jews. The Russian Mission is on East 67th Street between Lexington and Third Avenues in the 19th police precinct in the City of New York. A co-chairman of CJY went to the 19th precinct in June, 1978 to apply for a permit to use sound equipment in front of the Mission. The Captain in charge, Mario Selvaggi, informed CJY that only twelve

persons would be allowed to demonstrate in a "bull pen" diagonally across the street from the Mission.[1] Any additional demonstrators could protest on East 67th Street between Park and Lexington Avenues. (Tr. 23, 143). In addition, Captain Selvaggi informed CJY that no sound device would be allowed on East 67th Street between Third and Lexington Avenues (i.e., on the Mission block). Sound devices would only be permitted on the northeast corner of East 67th Street and Lexington Avenue. (Tr. 25, 44). The Captain referred to the "Dollinger" decision, which outlined various restrictions which would be put on demonstrations by certain groups in front

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1. This bull pen was approximately 118' east of the front entrance of the Mission on the north side of East 67th Street (the Mission is on the south side). It was in front of an apartment building at a point on the block where the sidewalk is the widest. (Tr. 129).

of the Mission.[2] Although CJY was not a party to that action, Captain Selvaggi applied the rational behind the Dollinger restrictions to CJY.

CJY held a demonstration at the Russian Mission in June, 1978. In accordance with Captain Selvaggi's instructions to CJY, only twelve persons were allowed inside the "bull pen", and they were not permitted to have a sound device. A few other demonstrators stayed off the Mission block, as they had been instructed to do. Another demonstration planned for January 5, 1979 was not held because CJY felt that the demonstration, like the previous one, would be "ineffective and unsuccessful". (Appellant's Br. 15).

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2. Millan House Inc. v. Murphy, Civ. No. 10560 (Sup. Ct. N.Y. County 1971). Dollinger was a suit brought by residents of the area against, among others, the New York Police and the JDL.

CJY makes various First Amendment claims that will be bifurcated for the purpose of discussion. The first claim is that the restrictions on the location and number of demonstrators violate their rights under the First Amendment. The second is that the restrictions on the use of a sound device impair their freedom of speech. We find that the time, place and manner restrictions in this case are necessary to further a strong governmental interest, and affirm the holding of the District Court.

I.

The right to a public forum for the discussion and interplay of ideas is one of the foundations of our democracy. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for pur-

poses of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 396, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939).

However, the right to speak, assemble, and discuss is not absolute. Although the "government has no power to restrict such activity because of its message", Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S.Ct. 2294, 2303, 33 L.Ed. 2d 222 (1972) (footnote omitted), it is "equally clear . . . that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted". Id. (footnote omitted). The Supreme Court recently stated "We have often approved restrictions [on time, place and manner] provided that they are justified without reference to the content of the regulated speech, that they

serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information". Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed. 2d 346 (1976). The balancing process which is required in these situations was best described by Justice Blackmun: "Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question". Lehman v. City of Shaker Heights, 418 U.S. 298, 302-303, 94 S.Ct. 2714, 2717, 41 L.Ed. 2d 770 (1974) (citations omitted).

Thus, once the restrictions are found to be content-neutral, and it is determined that alternative avenues of communication are available, the question becomes one of balancing, based on the nature of the forum, the governmental interest in enforcing the restrictions against the inhibitions the restrictions impose on the speech-related activity. See, e.g., L. Tribe, American Constitutional Law, 682-84 (1978). We are convinced that these contested restrictions are not directed at the content of the speech. No one has suggested, nor has any evidence been proffered, that there is or has been any attempt to suppress the expression of CJY's ideas merely because of what its members are saying.

There are easily accessible alternative channels for communication of CJY's ideas. These alternatives include the

twelve persons in the "bull pen" and the open access to the overflow areas on Lexington Avenue and further west on 67th Street. We do not think that the First Amendment guarantees news publicity for speakers, nor does it guarantee the continued fervor of one's fellow demonstrators.[3]

The question then comes down to one of balancing the interests involved. We appreciate that the rights granted by the First Amendment are important, but hold that the governmental interest in the pro-

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3. At trial, a co-chairman of CJY stated that CJY's right to convey its point of view even in the bull pen and surrounding areas was precluded because "I would assume that the press would not be very interested in covering 12 people in a bull pen" (Tr. 35), and that "the 11 people with me, were not very much inclined to think that the rally was a success and want to do it again. They were kind of embarrassed. I would have trouble getting those particular people to come back". (Tr. 35-36).

tection of the Russian Mission and the residents of the area outweighs the comparatively minor restrictions placed on CJY.

The government interest in providing security, safety and silence may, at times, be superior to asserted First Amendments rights. A statute, ordinance or regulation which embodies these interests will be valid even though it infringes on purported constitutional guarantees. Thus, the governent rights associated with jails (all demonstrations, Adderley v. Florida, 385 U.S. 39, 48, 87 S.Ct. 242, 247, 17 L.Ed. 2d 149 (1966)); schools (loud behavior may be excluded, Grayned v. City of Rockford, 408 U.S. 104, 121, 92 S.Ct. 2294, 2306, 33 L.Ed. 2d 222 (1972)); courthouses (statute prohibiting picketing valid on its face, Cox v. Louisiana, 379 U.S. 559, 564, 85 S.Ct. 476, 480, 13 L.Ed. 2d 487

(1965)); and military installations (political campaign appearances may be banned, Greer v. Spock, 424 U.S. 828, 838, 96 S.Ct. 1217, 47 L.Ed. 2d 505 (1976)).

The United States and the New York City Police have a substantial interest in protecting foreign officials and their property. The New York City Police, pursuant to their mandate in §435 of the New York City Charter, must "preserve the public peace, . . . [disperse] assemblages which obstruct the free passage of public streets, sidewalks, parks and places; [and] protect the rights of persons and property. . . ." This includes the members and proeprty of a Foreign Mission.

The United States is charged by various international obligations to protect diplomatic personnel and has recognized its obligation statutorily. See, e.g., Article 22(2) of the 1961 Vienna Conven-

tion on Diplomatic Relations, 23 U.S.T. 3227, 3237, TIAS No. 7502 (protection of missions); Section 16 of the Headquarters Agreement between the United Nations and the United States (61 Stat. 758, 763) (Headquarters of member states to be protected from disturbance); and 18 U.S.C. § 112 (1976) (providing for severe criminal penalties for harassment or assault of foreign officials).

We do not think that the federal statute (18 U.S.C. § 112) was designed to take all power to control demonstrations at Foreign Missions away from local authorities as CJY argues. The relevant provision was enacted "to protect the peace, dignity and security of foreign officials and guests in their embassies, consulates, missions, residences and offices". Sen. Rep. No. 92-1105, 92d Cong., 2d Sess. reprinted in U.S. Code Cong. & Admin. News

4316, 4328 (1972). Any actions local authorities may take to aid in protecting foreign officials furthers this intent of Congress in enacting the legislation. The law did not set maximum standards of protection, but rather set minimum standards, and specifically left open the situation where local authorities might use stricter controls. See Pub. L. 92-539, 86 Stat. 1070, 1073, § 3 (1972); Pub. L. 94-467, 90 Stat. 1997, 2001, § 10 (1976).

When the New York City Police instituted these restrictions on demonstrations in front of the Mission, they were simply protecting the Mission and its personnel. There have been numerous instances of violence at the Russian Mission. In 1971 and 1976 shots were fired at and into the Mission. In 1975, containers of red paint were thrown at the Mission splattering paint on walls and doors. Finally, in

1977 and 1978 there were problems with unruly demonstrators in front of the Mission. (Br. of U.S. at 2-3). More recently, the Russian Mission was bombed for the first time.[4]

The Police implemented the restrictions because of this violence and because they were aware that even a peaceful demonstration could be infiltrated by members of a violent group. (Tr. 85-86). One Co-chairman of CJY admitted that through deceit or inadequate screening by CJY, violent demonstrators could be among their ranks at a protest. (Tr. 54-56). Finally, one police officer testified that even peaceful demonstrators walking immediately adjacent to the Mission could become

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4. On Tuesday evening December 11, 1979, the Russian Mission was bombed by a terrorist group. Four policemen and four employees of the Mission were injured in the bombing. N.Y. Times, Dec. 12, 1979, § A, p. 21, cols. 1-6.

stirred to violence, due to the emotional reaction to seeing the Russian Mission. (Tr. 132). Because of the potential violence which might result when persons demonstrate in front of the Mission, the restrictions were properly imposed.

Testimony at trial established that the only reasonable place for the 12 demonstrators would be in the bull pen. (Tr. 127-30). There they can be seen from the Mission, but do not interfere with Mission personnel or property, and do not interfere with the synagogue, police station, schoolhouse, and firehouse across the street from the Mission. These restrictions are no greater than required to maintain the governmental interest involved in this case. Therefore, we agree with and affirm Judge Pollack's holding:

> "There is substantial empirical evidence that to allow expanded demonstrations in front of the Soviet Mission would unduly and

> unnecessarily impair this interest [in protecting the Soviet Mission]. The area presently designated for picketing was selected for reasons which make sound sense under the special conditions existing on the block; the requirement that after dark, demonstrators are asked to reduce the noise level is entirely reasonable; the object of the police to accommodate both the demonstrators' right of assembly and the rights of nondemonstrators to peaceful and unobstructed passage consistent with safety meets fundamental concerns fairly. Basically the whole subject matter is one of degree and judgment and no better yardsticks than the ones employed are presented or apparent." 469 F. Supp. 1296 at 1303.

The restrictions are in line with Justice Marshall's declaration that "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.'" Grayned v. City of Rockford, 408 U.S. at 116 92 S. Ct. at 2303 (footnote omitted).

Finally, the privacy interests of the residents of the block must be briefly considered. "[T]he homes of men, sometimes the last citadel of the tired, the weary and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators. . . ." Gregory v. Chicago, 394 U.S. 111, 125-26, 89 S.Ct. 946, 954, 22 L.Ed. 2d 134 (1969) (Black, J. concurring opinion). See also, Cohen v. California, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786, 29 L.Ed. 2d 284 (1971); Kovacs v. Cooper, 336 U.S. 77, 89, 69 S.Ct. 448, 454, 93 L.Ed. 513 (1949). Here, the residents of the block do have some right not to be obstructed, bothered, or abused by myriad demonstrators on their street. Although the New York Police have not explicitly instituted the restrictions because of this factor, they have tacitly acknowledged a need for privacy in adopt-

ing the standards set out in Dollinger.[5] This privacy interest is an important consideration in tilting the balance toward the constitutionality of the restrictions.

Further supporting our holding is the fact that the restrictions impose only a minimal inhibition on the ability of CJY to communicate its ideas. The group is free to demonstrate diagonally across from the Mission where the Mission personnel can see and hear them. (Tr. 142). Additional space for demonstrating is available in the immediate area. When asked what was the purpose of the demonstration in front of the Mission, a co-chairman of CJY stated "To publicize the cause of Soviet Jewry". (Tr. 20). This suggests

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5. Dollinger was a suit by residents of the area. Demonstrators were limited in the area specifically because of the previous infringement on the residents' privacy right.

that the audience at which the demonstration was directed was the American public at large. We see little impact on the effectiveness of the communication, or on the ability of CJY to convey its ideas to those persons, because of these restrictions. The fact that the restrictions only minimally inhibit expression serve to lighten the balance on the side of CJY, confirming our holding that these restrictions are permissible.

One final point that must be discussed before addressing the "sound device" restrictions is the manner in which these restrictions were imposed. Surely a narrowly drafted legislative enactment specifically outlining the restrictions would be constitutionally proper. But this case involves the decision of the police made according to power vested in them by a municipal ordinance. Pursuant to the or-

dinance, the police adopted restrictions on demonstrations in front of the Russian Mission, which had been outlined, in part, in a state court opinion.

The New York City Charter § 435 states, in relevant part:

> "The police department and force shall have the power and it shall be their duty to preserve the public peace . . . disperse unlawful or dangerous assemblages and assemblages which obstruct the free passage of public streets, sidewalks, parks and places; protect the rights of persons and property, guard the public health, preserve order at . . . all public meetings and assemblages; [and] . . . control and restrict the movement of . . . pedestrain traffic for the facilitation of traffic and the convenience of the public as well as the proper protection of human life and health. . . ."

Pursuant to this mandate, and after analyzing the previous violence, disturbances, and the potential for danger in front of the Soviet Mission, the New York City police sought to prohibit entirely demon-

strations on the Russian Mission block. Later, in an action brought by residents of the block, Millan House Inc. v. Murphy, Civ. No. 10560 (Sup. Ct. N.Y. County 1971) Justice Isidore Dollinger of the New York County Supreme Court approved the police's decision respecting demonstrations. But he held, among other things, that the groups involved in that suit would be limited to 12 demonstrators in the immediate vicinity of the Russian Mission. The police then evidently revised the restrictions on demonstrations to 12 persons in the "bull pen" area and added the overflow location. When Captain Selvaggi took command of the 19th Precinct, he made some minor changes in the restrictions on demonstrating, but basically kept the same arrangements. (Tr. 147).

We find that the restrictions imposed by the police pursuant to the mandate of

§ 435 are constitutionally proper. Although the ordinance gives the police a certain amount of latitude in protecting persons, "Condemned to the use of words, we can never expect mathematical certainty from our language". Grayned v. City of Rockford, 408 U.S. at 110, 92 S.Ct. at 2300 (footnote omitted). "It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets [and presumably sidewalks] for public assemblies may be vested in administrative officials. . . ." Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 466, 13 L.Ed. 2d 471 (1965). This is especially true where, as here, the ordinance has been given a narrow construction by the police department. Furthermore here there is little real effect on the legitimate

expression of ideas.[6] As has been pointed out, CJY is allowed to demonstrate and convey its feelings within sight of the Russian Mission. The use of the overflow area by the excess over 12 demonstrators does not have a real and substantial effect on CJY's conveying the claimed iniquity of the treatment of Jews in Russia.

Additionally, the fact that the ordinance deals with police protection in New York City is of import. As Justice Frankfurter has said:

> "We must be mindful of the enormous difficulties confronting those charged with the task of enabling the polyglot millions in the City of New York to live in peace and tolerance. Street-preaching in Columbus Circle is done in a milieu quite different from preaching on a New England

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6. Cf. Erznoznik v. City of Jacksonville, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125 (1975) (discussion of criteria used to determine if a state statute is valid on its face).

> village green." Niemotko v. Maryland, 340 U.S. 268, 284, 71 S. Ct. 325, 328, 334, 95 L.Ed. 325, 328 (1951) Frankfurter, J., concurring).

Likewise, demonstrating on a narrow side-street in the crowded Upper East Side of New York City presents more difficult problems than protesting on main Street in a small community.

II.

We turn now to the restriction on the use of sound equipment on the Mission block. In this case, use of the device was not banned, but rather the location at which the loud speaker could be used was restricted. That restriction also passes constitutional muster, and we affirm the decision of the District Court on this point.

We note initially that because sound devices have a way of making a listener out of someone who may not wish to

hear, their use may be curtailed. See Kovacs v. Cooper, 36 U.S. 77, 86-87, 69 S.Ct. 448, 453, 93 L.Ed. 513 (1949). This is because freedom of speech does not include the right to intrude or force one's viewpoint on a hapless resident or bypasser. Cohen v. California, 403 U.S. 15, 21, 91 S.Ct. 1780, 1986, 29 L.Ed. 2d 284 (1971). "In his home or on the street [an unwilling listener] is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality." Kovacs, supra, 336 U.S. at 87, 69 S.Ct. at 453. Finally, the Supreme Court has pointed out "The hours and place of public discussion can be controlled." Saia v. New York, 334 U.S. 558, 562, 68 S.Ct. 1148, 1150, 92 L.Ed. 1574 (1948).

We hold that as applied to the appellants in this case the restrictions on

their use of sound equipment, imposed after tacit consideration of the Dollinger decision and the New York Administrative code,[7] do not run afoul of the constitution. Implicit in the restrictions is the finding that there is an overriding governmental interest in maintaining the area immediately in front of the Russian Mission free from excessive noise. This is primarily for the benefit of the personnel working and living in the Mission, but is also for the benefit of the area residents and the various institutions near the Mission (a school, synagogue, firehouse, and police station). We cannot say that the restriction, adopted by the police department after consideration of the locale, imposes such a barrier to CJY's right to

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7. Section 435-6.0 which deals with the regulation of sound devices in New York City.

free expression so as to be constitutionally infirm. See A Quaker Action Group v. Morton, 516 F.2d 717, 734 (D.C. Cir. 1975). Such restrictions are especially necessary in the City of New York where multifarious interests associated with the millions of residents, visitors, and workers must be balanced so that all may live in mutual tolerance.

We affirm the decision of the district court.

MANSFIELD, Circuit Judge (dissenting):

I dissent. We have long recognized the inadvisability of entrusting to the protectors of public order the unchecked authority to restrain First Amendment activity, for there is a tension, requiring careful and sensitive balancing, between freedom and order. Therefore the Constitution has long been read to prevent the police from imposing substantial prior re-

straints except pursuant to considered and detailed legislative guidelines. Even then, close judicial scrutiny must follow.

This case presents an unfortunate example of the consequences of carte blanche legislative authorization and deferential judicial review. In my view the New York City police, in the name of peace and public order, have engaged in an unlawful overkill and prior restraint of appellants' exercise of their First Amendment right to picket and demonstrate in a peaceful and orderly manner. The restrictions go far beyond measures that are justifiable as reasonably necessary to public needs. The reason for this sad state of affairs is that state legislation and the City Charter purport to vest the police with virtually unlimited authority to impose restrictions upon lawful demonstrations. In the absence of any legislative standards

the police, instead of proscribing only activity posing a serious threat to society and searching for less restrictive alternatives, have chosen the easier course of riding rough-shod over the demonstrators' exercise of First Amendment rights in the very place where they are entitled to the most protection - our city's streets. It is rather ironic and unfortunate that at a time when the President of our country is calling upon all peoples and nations to demonstrate against the recent Soviet invasion of Afghanistan, our local police should be vested with powers enabling them completely to bar response to this exhortation.

We start with certain indisputable propositions of law. The first of these is that public places, particularly streets and sidewalks, are the normal and natural locations for our citizens' exercise of

their First Amendment right of free speech.

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens." Hague v. C.I.O., 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed 1423 (1939) (Roberts, J.).

See also Lehman v. City of Shaker Heights, 418 U.S. 298, 303, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770 (1974); Wolin v. Port of New York, 392 F.2d 83, 89 (2d Cir.), cert. denied, 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968).

While the state may reasonably regulate the time, place and manner of the exercise of First Amendment rights as necessary to protection of other compelling public interests, Grayned v. City of Rockford, 408 U.S. 104, 115-16, 92 S.Ct. 2294,

2302-03, 33 L.Ed.2d 222 (1972); Police Dept. v. Mosley, 408 U.S. 92, S.Ct. 2286, 2291, 33 L.Ed.2d 212 (1972); Adderley v. Florida, 385 U.S. 39 87 S.Ct. 242, 17 L.Ed. 2d 149 (1966); Cox v. Louisiana, 379 U.S. 536, 554-55, 85 S.Ct. 453, 464, 13 L.Ed. 2d 471 (1965), "time and place" regulations can enormously hinder the individual's ability to engage in effective advocacy. A number of limitations on this type of regulation are therefore essential. Where direction is to be vested in administrative officials, it must be "appropriate, limited discretion under properly drawn statutes or ordinances." Cox v. Louisiana, supra, 379 U.S. at 558, 85 S.Ct. at 466 (emphasis supplied). See also Shuttlesworth v. City of Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed. 2d 162 (1969); Saia v. New York, 334 U.S. 558, 562, 68 S.Ct. 1148, 1150, 92 L.Ed. 1574

(1948). The exercise of First Amendment rights may not be abridged at the unbridled will or broad discretion of government officials, even though this would doubtless facilitiate law enforcement and spare public expenses and inconvenience. The more substantial the encroachment on protected rights, the greater the need for carefully considered and articulated standards. "Access to the 'streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly. . . .'" Grayned v. City of Rockford, supra, 408 U.S. at 117, 92 S.Ct. at 2304 (quoting Amalgamated Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308, 315, 88 S.Ct. 1601, 1606, 20 L.Ed. 2d 603 (1968)).

Even when regulations are fully authorized by explicit and narrow legisla-

tive authority, they must be "narrowly tailored to further the State's legitimate interest," Grayned v. City of Rockford, supra, 408 U.S.at 116-117, 92 S.Ct. at 2303-2304; Police Dept. v. Mosley, supra; Cox v. New Hampshire, 312 U.S. 569, 575-76, 61 S.Ct. 762, 765, 85 L.Ed. 1049 (1941). The state bears the burden of justifying restrictions, e.g., Cohen v. California, 403 U.S. 15, 20, 91 S.Ct. 1780, 1785, 29 L.Ed. 2d 284 (1971). Regulations which take the form of prior restraints are subject to particularly exacting judicial scrutiny. Organizations for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577 29 L.Ed. 2d 1 (1971); Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 181, 89 S.Ct. 347, 351, 21 L.Ed. 2d 325 (1968). Moreover, exercise of First Amendment rights, when logically related to a particular forum, is

further protected from regulations which would preclude the use of that place. Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed. 2d 637 (1966) (plurality opinion); Albany Welfare Rights Org. v. Wyman, 493 F.2d 1319, 1323-24 (2d Cir.), cert. denied, 419 U.S. 383, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974).

In balancing the individual's right to demonstrate against the concern for quiet or the protection of others, the competing interests must be assessed on an individual basis; blanket bans and absolute prohibitions against picketing in front of or near a site have been universally condemned where a less restrictive and more sharply tailored alternative may be formulated. As the Supreme Court stated in Police Dept. v. Mosley, supra, 408 U.S. at 100-01, 92 S.Ct. at 2293:

> "Predictions about imminent disruption from picketing involve

> judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter."

In short, although limited regulation is permitted, it must be carefully defined and sufficiently circumscribed to minimize the opportunities for abuse of discretion on the part of administrative officials, lest this treasured constitutional right of free speech and expression be subjected to excessive or unnecessary restraints.

None of the foregoing principles are likely to make the policeman's lot a happy one. The proper acquittal of this heavy responsibility is difficult. The officer's life would be easier if he had broad discretion to squelch free speech and assembly without the necessity of tailoring any restraints to what is absolutely necessary in each individual case. Unfortunately such discretion has been permitted

in the present instance, where the police have been accommodated by both state and city. The result, unsurprisingly, is an excessive restraint. With due respect, the majority has either misconceived the function of the police in this tension or given only lip service to basic time-honored principles of free speech and expression.

Section 435 of the New York City Charter provides in pertinent part that "[t]he police department and force shall have the power ... to preserve the public peace [and] disperse awful or dangerous assemblages and assemblages which obstruct the free passage of the public streets, sidewalks, parks and places." It is pursuant to this all-encompassing grant of power that the police claim the authority to impose restrictions on the block of the Soviet Mission. This is not their first

such essay. The police previously attempted to bar all demonstrations on this very block, claiming authority under this same general statute. The courts of New York had no difficulty concluding that § 435 could not constitutionally, and did not, authorize such a prohibition:

> "Neither City nor State authorizes the policy to permanently and absolutely close a public street to those persons seeking to exercise their First Amendment rights. Such prohibition is therefore unlawful." People v. Solomonow, 56 Misc. 2d 1050, 291 N.Y.S.2d 145, 150 (N.Y. County 1968).

While the present restrictions on demonstrations are not quite as absolute as the total ban invalidated in Solomonow, their effect is nearly the same. Twelve lonely demonstrators, without sound equipment, may walk in a small barricaded area far removed from the Soviet Mission -- at the end of the block on the other side of the street. Should any more than 12 wish

to demonstrate, they must move to a different block. This handful of demonstrators is unlikely to be seen or heard, while demonstrators choosing to picket other sites must endure no such restrictions. If the statute does not authorize absolute bans, I must conclude that the present regulations are similarly unauthorized and unlawful.

If the statute is to be read as conferring authority on the police to implement the restrictions, it does not meet constitutional requirements. This broad grant of uncontrolled authority, which the police in their absolute discretion have used in deciding that all assemblages except those restricted to 12 people cordoned off down the block are "dangerous," is hardly in keeping with the requirement that a regulatory statute be "precise and narrowly drawn," Edwards v. South Carolina,

372 U.S. 229, 236, 83 S.Ct. 680, 684, 9 L.Ed. 2d 697 (1963); Cox v. Louisiana, 379 U.S. 559, 562, 85 S.Ct. 476, 479, 13 L.Ed. 2d 487 (1965); Niemotko v. Maryland, 340 U.S. 268, 272, 71 S.Ct. 325, 327, 95 L.Ed. 328 (1951). No standards are offered to guide the police in balancing the individual's right to assemble, picket and demonstrate against the necessity for preservation of public order and protection of the Soviet Mission. Indeed, as in Niemotko v. Maryland, supra, 340 U.S. at 272, 71 S.Ct. at 327, "[n]o standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served." The regulation, instead of being designed to protect constitutional rights, appears to be tailor-made to preserve "law and order" at any cost.

Regardless of the lack of statutory authority or of a constitutionally acceptable basis for the police restrictions in the present case, it is clear that the police failed to make an adequate showing of the necessity for such harsh conditions as were imposed upon appellants. In the first place the police failed at the outset, when advised by Concerned Jewish Youth (CJY) that its members proposed to demonstrate peacefully and in orderly fashion on the sidewalk in front of the Soviet Mission, to ascertain whether CJY could be expected to act responsibly and whether it posed any substantial risk of violence or danger to the Mission or anyone else. Instead the local police followed their practice of automatically and blindly applying an order that had been entered seven years earlier by the late Justice Isidore Dollinger of the New York

State Supreme Court in Millan House v. Murphy, Civ. No. 10560 (N.Y. County 1971), which involved an entirely different group of defendants, some believed to be militant (Jewish Defense League, Student Struggle for Soviet), that had previously engaged in massive and unruly demonstrations in front of the Soviet Mission. With minimal attention to First Amendment concerns and without any findings as to less restrictive alternatives, the court there imposed restrictions limited to the defendants in that case.

Seven years later, after being advised of the CJY's plans the police, rather than fulfilling their duty of making an individualized determination, informed them of the policy, pursuant to the unlimited discretion vested in them by § 435, of applying the "Dollinger" order to all persons who might seek to demonstrate in

the future. This was patently wrong and violated the police's basic obligation to determine what restrictions, if any, might be required in this entirely different case. "In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Police Dept. v. Mosley, supra, 408 U.S. at 101, 92 S.Ct. at 2293 (quoting Tinker v. Des Moines School District, 393 U.S. 503, 508, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969)).

Indeed as the record shows, this is an entirely different case from Millan House v. Murphy. If the police had investigated they would have found that, unlike the parties to the "Dollinger" case, the CJY has rejected association with militant organizations working in the cause of Soviet Jewry. The CJY, in contrast to the Jewish Defense League (JDL) is dedicated

to accomplishment of its aims without violence. It first approached the police, not vice versa, on the subject of demonstrating, even though it was under no legal obligation to do so. It sought to demonstrate peacefully by simply marching in an oval shape during daylight hours on the 15'4" wide sidewalk in front of the Soviet Mission, without harassing anyone entering or leaving the Mission or blocking the street or entrance to any building. The CJY has indicated that it was even willing to consider being required to restrict its demonstrations to a "bull-pen" or confined area in front of the Mission or to one side of its entrance. The CJY has no history of violence and there is no evidence that it might be goaded into violence or harassment or used as a cover for such kind of operations. Indeed Judge Pollack, who viewed some CJY members, re-

ferred to it as "an organization of nice young men from Queens whose purposes have a very therapeutic appeal."

In what appears to be a belated effort to justify their automatic, reflex reliance on the "Dollinger" order to refuse any demonstration on the sidewalk near the Mission, the police attempted in the district court to show that they had learned that others, such as FALN, JDL and anti-Castro Cubans, had planned to attach themselves to any "large-scale" demonstrations in order to plant bombs. The majority further points to news articles about a recent bombing (since the district court hearing) which did not involve any demonstration at all. However, it is not contended that any of this had anything to do with the CJY, which is a peaceful organization, or its members. The CJY, moreover, does not seek "large-scale" demonstrations

and its history of giving advance notice to the police of its plan to demonstrate is inconsistent with fears of violence or lawlessness on its part. Many people walk past the Soviet Mission daily. If someone intends to bomb the Mission, he will do it without any assistance from the CJY.

The police further seek support for their action by pointing to 18 U.S.C. § 112, which makes it a federal crime to demonstrate within 100 feet of a foreign mission with intent to coerce, harass or obstruct a foreign official. That statute, however, affords the City no justification for the draconian restrictions imposed here. Aside from the necessity of proving specific intent - and in the present case the CJY expressly disclaims any intent to harass or obstruct members of the Mission - the same statute provides that nothing in it shall be construed to abridge First

Amendment rights, 18 U.S.C. § 112(d). Moreover, in enacting § 112 Congress took pains repeatedly to express concern for recognition of the right to "legitimate expression and assembly." See S. Rep. No. 92-1105, 92nd Cong., 2nd Sess. 1972, U.S. Code Cong. & Admin. News 4316, 4328.

In short, the restriction imposed by the New York police on the CJY is impermissibly broad and, in the absence of a finding based on substantial evidence that less restrictive alternatives would not reasonably protect the public interest in peace and order, is a violation of appellants' constitutional rights. It embodies a philosophy of governmental power that is contrary to basic precepts repeatedly endorsed by the Supreme Court with respect to the First Amendment. The police erroneously presume that an order issued with respect to other persons under other cir-

cumstances may thereafter be applied to all, regardless of a sharp difference in circumstances. They also presume that any would be demonstrators, though not shown to be associated with the parties to the earlier order, are dangerous. They ignore the fact that to justify these extreme restrictions, the burden is on the police to investigate and balance the interests in each case, with respect for the presumption in favor of exercise of First Amendment rights. This difficult task they have refused to face.

Moreover, the attitude of the City is that since the "Dollinger" order permits some demonstrating, however far from the Mission, that should suffice. This ignores the principle that since the effectiveness of any demonstration depends on its proximity to the target and the relevant audience, it is unlawful to exile

demonstrators to an irrelevant milieu. Wolin v. Port Authority of New York, supra, 392 F.2d at 90. The purposes of a peaceful and orderly rally or demonstration are to try to impress the target - in this case the Soviet occupants of the Mission - and to publicize the cause to others. Neither objective is served by a demonstration elsewhere, around the corner or at the other end of the block on the other side of the street (where the sidewalk is substantially the same width, 16 feet 4 inches as compared with 15 feet four inches). If persons may be permitted to demonstrate in front of a school, Grayned v. City of Rockford, supra, in a library, Brown v. Louisiana, supra, or at the White House and its executive offices, A Quaker Action Group v. Morton, 516 F.2d 717 (D.C. Cir. 1975), surely a right to demonstrate in front of a foreign mission should not

be denied out of hand. See Greenberg v. Murphy, 329 F.Supp. 37 (S.D.N.Y. 1971) (permitting picketing at side entrance of United States Mission to UN and presentation of petitions at front entrance).

For similar reasons the police's absolute ban on use by the CJY of any sound equipment whatsoever on the Soviet Mission block cannot be justified as a matter of law. Indeed it clearly violates § 435-6.0 of New York City's Administrative Code, which obligates the City to issue sound permits under specified conditions. CJY has unequivocally agreed in writing to abide by these conditions, affirming that it would not employ sound equipment during school, worship or sleeping hours. The effect of the denial is to give the Mission more protection from sound equipment than other New York City residents. We are not here confronted with the constitu-

tionality of a law prohibiting all sound equipment in residential areas, which would present a different case, but with a law that entitles the CJY to a permit. The majority agrees that the police gave "tacit consideration" to the statute. Surely the police must do more than give tacit consideration to the governing law they must follow it.

Notwithstanding the CJY's entitlement to a permit, the police simply brushed off its application by again invoking the seven year old prohibitions of the "Dollinger" order, even though it involved different parties, a different time and different conditions. In my view the denial is unconscionable.

It is an unfortunate if understandable fact of life that because of the very nature of their function of maintaining law and order in a community the police

cannot be relied upon to respect First Amendment rights where to do so would only serve to increase their own burdens and risks. For this reason it is vital that the courts, as the only haven of refuge for those seeking protection of their rights, be eternally vigilant and willing to command police respect for First Amendment rights rather than acquiesce in their denial, which is the easier course. The erosion of human rights is usually begun with the excuse that curtailment is essential to meet an emergency or avoid a threat to public order. But the ultimate strength of our constitutional guarantees lies in their being unhesitatingly applied in times of crisis and tranquility alike. "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." Home Building & Loan Assn. v.

Blaisdell, 290 U.S. 398, 483, 54 S.Ct. 231, 256, 78 L.Ed. 413 (1943) (Sutherland, J., dissenting). With due respect, the majority in my view abdicates its responsibility for insuring that First Amendment rights are not lightly cast aside or ignored in the name of law and order.

For these reasons, I would remand the case to the district court with directions to enter a preliminary injunction on terms and conditions that will permit demonstrations by the CJY near the Soviet Mission, reasonably limited as to time, place, method and number of participants, in lieu of the cavalier denial through invocation of the so-called "Dollinger" order.

Appendix B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

CONCERN JEWISH YOUTH, :

Plaintiff, : 78 Civ.4891(MP)

v. :

ROBERT J. McGUIRE, in his official capacity as Police Commissioner of the City of New York, EDWARD KOCH, in his official capacity as the Mayor of the City of New York, and the NEW YORK POLICE DEPARTMENT, :

Defendants. :

----------X

D E C I S I O N

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MILTON POLLACK, District Judge.

This is a motion for a preliminary injunction enjoining the defendants, the Mayor and Police Commissioner of New York City, from enforcing the restrictions on demonstrations at the Soviet Mission to the United Nations currently in effect. Plaintiff alleges that the current restrictions impermissibly infringe on the rights of its members protected by the first amendment guarantee of free speech and assembly.

The Soviet Mission is located at 136 East 67th Street, between Lexington and Third Avenues, on the south side of the street. The Mission building contains the offices of the Mission and residential apartments for some of the Russian employees of the Mission.

The restrictions currently enforced at the Mission by the defendants evolved from the terms of a preliminary injunction entered by Justice Dollinger of New York State Supreme Court in 1971. Plaintiff was not a party to the state court action, which has not yet gone to trial.

Defendants permit no demonstrations on the Mission block, except that they permit 12 demonstrators to stand behind barricades in a designated "bull pen" area. That area, on the sidewalk in front of the apartment building at 167 East 67th Street, is approximately 118 feet from the front

entrance to the Mission, diagonally across the street toward Third Avenue.

The 12 demonstrators in the bull pen are subject to search and must identify themselves to the police on demand. No permits for the use of sound equipment are issued for the Mission block. Any demonstrators in excess of twelve and any sound equipment must remain on the far, or west side of Lexington Avenue.

The plaintiff, CJY, seeks a preliminary injunction and order which would permit it to hold peacful demonstrations on the Mission block. In particular, it seeks to hold demonstrations involving no more than 30 of its members on the sidewalk directly in front of the Mission, but not blocking its front door. The proposed order specifies that no entrances to any building on the block would be obstructed. Plaintiff further seeks to use sound equip-

ment on the Mission block, its use to be limited to the hours between 9:00 A.M. and 10:00 P.M. and not during school hours or worship services at the synagogue.

In order to be entitled to preliminary relief, the plaintiff must show

> possible irreparable injury and either (1) probable success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground to litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Caulfield v. Board of Education, 583 F.2d 605, 610 (2d Cir. 1978).

CJY

CJY is an unincorporated membership organization with about 300 members of whom approximately fifty are active. CJY is a registered student organization at

Queens College, where it is headquartered. The group was founded in 1975.

The stated goals of CJY are to combat anti-semitism, to help the Jewish poor, to work for the causes of Soviet and Arab Jewry, and to help other organizations. CJY is unaffiliated with other organizations, although it identifies with Herut-U.S.A., a Zionist group which supports the Herut Party in Israel. A CJY leader testified that most, if not all of the aims of CJY can be accomplished through non-violent action.

In June 1978 CJY held a demonstration at the Mission. It applied for a permit to use sound equipment at the demonstration. Sixteen CJY members attempted to demonstrate on the Mission block, but only 12 were permitted to enter the demonstration area on the block. The four others had to remain on the west side of

Lexington Avenue on 67th Street. Sound equipment was permitted only on the west side of Lexington Avenue. The demonstration was peaceful and orderly.

Wayne Perlmutter, a CJY leader present at the June demonstration, testified that the permitted number of demonstrators was too small to effectively carry their message to the people in the Mission, to attract media attention, or to encourage others to join their cause.

CJY was involved in two prior incidents of unlawful acts. A CJY member was arrested at a tennis match in Madison Square Garden for creating a disturbance by unfurling a banner and using a bullhorn. In a second incident, some CJY members overturned the literature tables of another student group at Queens College.

In 1978 CJY had an income of approximately $900, derived from various sources.

Demonstrations at the Mission

Defendants put several dozen police reports into evidence. Twenty-one of the reports concerned demonstrations at which no arrests were made. The number of demonstrators at these ranged from three to 1000; eleven of the demonstrations involved more than 30 people.

Eighteen reports concerned demonstrations at which arrests were made. The demonstrations ranged in size from one to 3500; twelve had more than 30 people. The number of persons arrested ranged from one to 89. All of the demonstrations occurred between 1971 and 1978.

The need to regulate demonstrations at the Mission

Several police officials testified as to their opinions on the need for regulation in the vicinity of the Mission. Detective Rosenthal, who had infiltrated the JDL as an intelligence agent, attended

several demonstrations and stated that it was easy to goad peaceful demonstrators to violence. He believes that the police cannot control a large number of demonstrators, and felt that a safety problem would arise if the current restrictions are lifted.

Detective Perola, a bomb squad investigator, said that no bomb had been exploded at the Mission during the last nine years, but that the police had learned of four plans to bomb the Mission during 1971-72. He said that among the tactics used by violent groups was the infiltration of demonstrations by peaceful groups to permit the bombers to approach the target without drawing the attention of the police. Perola testified that there would be a reasonable likelihood of danger to the Mission if picketing by any number of

people was permitted in front of the Mission.

David Fallek, a retired police inspector who was in charge of the Mission area prior to 1972, stated his opinion that the current restrictions at the Mission are necessary to maintain peace there. He felt that any demonstration on the Mission blocks presents a danger to the police.

Captain Selvaggi, commander of the 19th Precinct, stated that approximately 25 percent of his force is devoted to protecting the 45 diplomatic locations in the area. He believes that demonstrators should not be allowed directly in front of the Mission because emotions tend to rise near the Mission. He said that the chance that some demonstrators would break away and try to enter the Mission poses a safety problem, because he believes that the

Russians would use "deadly physical force" to eject intruders and to maintain control of their premises.

Captain Selvaggi testified as to how the police settled on the restrictions enforced at the Mission. The particular picket site was chosen so as to be more than 100 feet from the Mission (it is about 120 feet away), not to interfere with the functions of other buildings on the block (a school, a police station, a fire station, a synagogue), to be within view of the Mission (diagonally across the street), and to be on a relatively wide part of the sidewalk so that non-demonstrators may pass by. The limitation of the number of demonstrators on the block to twelve and the prohibition of the use of sound equipment appear to have been derived solely from the 1971 state court preliminary injunction. Selvaggi stated

that the requirement that demonstrators identify themselves and subject themselves to search is not enforced by the police at the present time.

Regulation of speech and assembly

It is well settled that picketing and demonstrations may be subject to reasonable "time, place and manner" regulations where necessary to further significant governmental interests, notwithstanding the expressive elements of such conduct. "[P]eople who want to propagandize protests or view [do not] have a constitutional right to do so whenever and however and wherever they please." Adderley v. Florida, 385 U.S. 39, 48, 87 S.Ct. 242, 247, 17 L.Ed. 2d 149 (1966).

In assessing the reasonableness of a restriction on expressive conduct, "the first amendment . . . requires . . . that the balance struck in any particular situ-

ation properly reflects the central position of free expression in the constitutional scheme." L. Tribe, American Constitutional Law 582 (1978). The regulation of picketing must not "substantially hinder," Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 323, 88 S.Ct. 1601, 20 L.Ed. 2d 603 (1968), or "unduly constrict", Tribe, supra at 581, the communication of the ideas sought to be expressed.

Streets and sidewalks "cannot be put off limits to . . . first amendment activities merely to spare public expense or inconvenience." Tribe, supra at 689. "The right to use a public place for expressive activity may be restricted only for weighty reasons." Grayned v. City of Rockford, 408 U.S 104, 115, 92 S.Ct. 2294, 2303, 33 L.Ed. 2d 222 (1972). To withstand scrutiny, "the regulations must be

narrowly tailored to further the State's legitimate interest." Id. at 116-17, 92 S.Ct. at 2304.

> Whenever it can be demonstrated that the result of the government's rule or policy is to limit in some significant degree the ease or effectiveness with which a speaker can reach a specific audience with a particular message, the government should lose the case unless it can establish that an important public objective unrelated to the message would be sacrificed by any less restrictive alternative.

Tribe, supra at 686.

One factor in the balancing process is the nature of the forum for the expressive activity in question. "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of

time, place and manner that are reasonable.'" Grayned v. City of Rockford, supra at 116, 92 S.Ct. at 2303 (quoting Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1042 (1969). "[P]laces that have traditionally been associated with the public exchange of views . . . represent areas within which tolerance for inhibitions on speech, petition and assembly is at a minimum, and government's burden of justification at its highest." Tribe, supra at 684. The public streets are one such "public forum."

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the

> streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.

Hague v. C.I.O., 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939).

However, the street and sidewalk are not the sole issue in the instant case. Expressive activity adjacent to other institutions, e.g., a school or a courthouse, may be regulated if it will otherwise "materially disrupt" the normal activities of the institution. Grayned v. City of Rockford, supra, 408 U.S. at 118, 119, 92 S.Ct. 2294. Regulation is permissible to prevent interference with the normal use of and access to the site of the expressive activity. Amalagamted Food Employees Union v. Logan Valley Plaza, Inc., supra, 391 U.S. at 321, 88 S.Ct. 1601. Concern over disruption of "normal activities" is

less weighty where the institution has a political or speech-related function. Thus, picketing near a courthouse may be prohibited because the picketers' intention to influence judges, jurors or witnesses is inconsistent with the unbiased, unprejudiced administration of justice. Cox v. Louisiana, 379 U.S. 559, 566-67, 85 S.Ct. 476, 13 L.Ed. 2d 487 (1965). On the other hand, picketing to protest against and to influence an elected or other political official at his city hall or capital office presents "entirely different considerations," id.; such activity, if peaceful, may not be prohibited as it is not incompatible with such semi-public facilities' purposes. See Tribe, supra at 690.

Defendants seek to place foreign missions in a category with courthouses, a category of public institutions which are

inappropriate sites for expressive activity. Defendants apparently rely on the duty of the United States to protect foreign embassies from invasion, insult and offensive demonstrations, Frend v. United States, 69 App. D.C. 281, 100 F.2d 691, cert. denied, 306 U.S. 640, 59 S.Ct. 488, 83 L.Ed. 1040 (1938), and seemingly contend that foreign missions are not proper targets of expressions by individual citizens who might interfere with the official conduct of foreign relations. However, no court has adopted defendants' position, and Congress has rejected it. Section 112 of Title 18 of the United States Code prohibits, inter alia, demonstrations within 100 feet of a mission with intent to intimidate or harass foreign officials. Subsection (d) of this law states that

> (d) Nothing contained in this section shall be construed or ap-

> plied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States.

That subsection was added to prevent the abridgement of legitimate expression and assembly near foreign missions. S. Rep. No. 92-1105, 1972 U.S. Code Cong. & Admin. News 4316, 4328. Picketing near the Mission should not be prohibited per se.

In balancing the rights of the plaintiff against the rights of Mission personnel and other residents, only the "substantial privacy interests" of the latter should be taken into account.

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being

> invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Cohen v. California, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786, 29 L.Ed. 2d 284 (1971).

Legislative authority for restrictions at the Mission

Plaintiff contends that defendants lack any legislative authority for the restrictions enforced by them at the Mission, and thus that the restrictions are unconstitutional because imposed in the exercise of defendants' unbridled discretion.

In People v. Solomonow, 56 Misc.2d 1050, 291 N.Y.S.2d 145 (Sup. Ct. 1968), the defendants were acquitted of charges of disorderly conduct stemming from their crossing of police barricades on the Mission block. The court held that the po-

lice ban on demonstrations was not authorized by any properly drawn statute or ordinance vesting limited regulatory authority in police officials.

> Neither the State nor the City have regulated the use of the streets occupied by foreign consulates or embassies. In the absence of legislation administrative officials may not exercise prior restraints on the exercise of First Amendment rights.
>
> * * * *
>
> . . . Neither City nor State authorizes the police to permanently and absolutely close a public street to those persons seeking to exercise their First Amendment rights.

291 N.Y.S.2d at 149-50.

Defendants rely on Section 145 of the New York City Charter for the authority to impose the challenged restrictions.

Subsection a of that section provides in part:

> The police department and force shall have the power . . . to . . . disperse unlawful or dangerous assemblages and assemblages which obstruct the free passage of public streets, sidewalks, parks and places; . . . preserve order at . . . all public meetings and assemblages . . . .

Plaintiff argues that this provision only permits the police to preserve order where the law is being violated, but does not authorize restrictions on peaceful expressive activity such as those imposed at the Mission.

Even if Charter § 435 were held to give the police a general authority to develop and enforce the practices challenged here, the breadth of the administrative

discretion accorded by the charter requires that the police regulations be subject to "exacting judicial scrutiny." A Quaker Action Group v. Morton, 148 U.S. App. D.C. 346, 351, 460 F.2d 854, 859 (1971). That case involved a challenge to regulations limiting demonstrations on the White House sidewalk, and the court refused to defer to the government's judgment about Presidential safety.

> "A balancing of First Amendment freedoms against the requirements of Presidential safety may be left to other agencies in the first instance. But . . . the final judgment must rest with the courts. To enable the court to reach a reasoned conclusion, it is incumbent upon any party who would invoke Presidential safety as a paramount consideration to provide the court with the information nec-

essary to an even-handed decision. * * * There has been no effort here to justify the Government's argument beyond the flat words of the Secret Service director. First Amendment rights are too precious for sacrifice upon such an unsupported altar." Id. (quoting A Quaker Action Group v. Hickel, 137 U.S. App. D.C. 176, 183, 421 F.2d 1111, 1118 (1969).

The Supreme Court has held unconstitutional statutes that permit local officials to regulate expressive conduct such as parades and street assemblies "in their completely uncontrolled discretion." Cox v. Louisiana, 379 U.S. 536, 557, 85 S.Ct. 453, 465, 13 L.Ed. 2d 471 (1965). Administrative officials must be guided by "narrow, objective, and definite standards" in their regulation of the exercise of first amendment freedoms. Shuttlesworth v.

Birmingham, 394 U.S. 147, 150, 89 S.Ct. 935, 22 L.Ed. 2d 162 (1969).

The Court more likely will defer to a legislative judgment about the proper balance of first amendment freedoms against competing governmental interests. For example, Rockford's prohibition of picketing that disrupts normal school activities was upheld because it "represent[ed] a considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place, here in order to protect the schools." Grayned v. City of Rockford, supra, 408 U.S. at 121, 92 S.Ct. at 2306. Similarly, a prohibition against picketing near a courthouse was upheld because it represented "a legislative determination based on experience that such conduct inherently threatens the judicial process." Cox v. Louisiana, supra, 379 U.S. 559, at

566, 85 S.Ct. 476, at 481.

In addition to the City Charter, defendants rely on 18 U.S.C. § 112 as authority for their practices on the Mission block. Section 112 provides in pertinent part:

> §112. Protection of foreign officials, officials guests, and internationally protected persons.
>
> (b) Whoever wilfully -
>
> (1) intimidates, coerces, threatens, or harasses a foreign official or an official guest or obstructs a foreign offical in the performance of his duties;
>
> (2) attempts to intimidate . . .; or
>
> (3) . . . within one hundred feet of any building . . . used . . . for diplomatic, consular, or

residential purposes by -

(a) a foreign government, including such use as a mission to an international organization;

congregates with two or more other persons with intent to violate any other provision of this section;

shall be fined not more than $500 or imprisoned not more than six months; or both.

Plaintiff does not dispute the interest of the United States in protecting diplomatic officials from the conduct proscribed by Section 112; it maintains, however, that Section 112 permits peaceful demonstrations near a foreign mission.

The ban on sound equipment

Plaintiff contends that the police ban on the use of sound equipment on the Mission block not only violates the first amendment, but that it is contrary to the

Administrative Code of the City of New York. Section 435-6.0 of the Administrative Code requires that the police commissioner issue a permit upon proper application with five days notice except for specified reasons. The Code provides in part:

> f. Issuance of permit; terms.- The commissioner shall not deny a permit for any specific time, location or use, to any applicant who complies with the provisions of this section, except for one or more of the reasons specified in subdivision g hereof or for nonpayment of the fee prescribed in subdivision h hereof, or to prevent overlapping in the granting of permits. . . .
>
> g. Special restrictions.-The commissioner shall not issue any permit for the use of a sound device

or apparatus:

1. In any location within five hundred feet of a school, courthouse or church, during the hours of school, court or worship, respectively, or within five hundred feet of any hospital or similar institution;

2. In any location where the commissioner, upon investigation, shall determine that the conditions of vehicular or pedestrian traffic or both are such that the use of such a device or apparatus will constitute a threat to the safety of pedestrians or vehicular operators;

3. In any location where the commissioner, upon investigation, shall determine that conditions of overcrowding or of street repair or other physical conditions are such that the use of a sound device or

apparatus will deprive the public of the right to the safe, comfortable, convenient and peaceful enjoyment of any public street, park or place for street, park or other public purposes, or will constitute a threat to the safety of pedestrians or vehicle operators;

4. In or on any vehicle or other device while it is in transit; or

5. Between the hours of ten p.m. and nine a.m.

Plaintiff contends that none of the foregoing conditions justifies the blanket policy of denying all applications for permits on the Mission block, and defendants have offered no evidence that the Commissioner made any of the determinations specified in the Code. Plaintiff argues that the sound ban on the blocks is thus an arbitrary exercise of defendants'

discretion exceeding both statutory and constitutional limits. Defendants reply that the ban is reasonable and necessary to preserve the peace of the Mission and to avoid any obstruction of the work of the Mission.

Irreparable Injury

Plaintiff contends that the denial of the requested preliminary relief would cause it to suffer irreparable injury and severe hardship. It is clear that if the restrictions imposed by the defendants are found to infringe to some degree the first amendment rights of plaintiff's members, that infringement will be irreparable in at least two senses. First, monetary damages are not likely to be recovered against the municipal officials, who could raise good faith defenses to damage actions. Second, money damages, even if available, would be inadequate, as timeliness is rec-

ognized as an important element of expressive activity. The opportunity to speak out on a matter of current interest, once lost, cannot be reclaimed.

Defendants argue that irreparable injury will not be suffered because the restrictions imposed on plaintiff are not complete; it may engage in first amendment activity anywhere but on the Mission block. However, the Supreme Court has stated:

> It goes without saying that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

Grayned v. City of Rockford, supra, 408 U.S. at 118 n.40, 92 S.Ct. at 2305 (quoting Schneider v. State, 308 U.S. 147, 163, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

Upon due consideration of the facts and circumstances presented, the Court

finds that the substantial interest which the United States has in protecting the personnel and premises of foreign diplomatic missions preclude the grant of preliminary injunctive relief. Rubenstein v. Murphy, No. 71 Civ. 2291 (S.D.N.Y. May 26, 1971) (Croake, J); Greenberg v. Murphy, 329 F. Supp. 37 (S.D.N.Y. 1971) (Gurfein, J.). There is substantial empirical evidence that to allow expanded demonstrations in front of the Soviet Mission would unduly and unnecessarily impair this interest. The area presently designated for picketing was selected for reasons which make sound sense under the special conditions existing on the block; the requirement that after dark, demonstrators are asked to reduce the noise level is entirely reasonable; the object of the police to accommodate both the demonstrators' rights of assembly and the right of nondemonstra-

tors to peaceful and unobstructed passage consistent with safety meets fundamental concerns fairly. Basically the whole subject matter is one of degree and judgment and no better yardsticks than the ones employed are presented or apparent.

The restrictions complained of apply to demonstrators and amplified noise immediately in front of the Soviet Mission. There are no similar limitations in the overflow adjacent areas. The case for irreparable harm has not been made out at this time. Indeed the character of this street and the pattern of usual activity on it srongly suggest that the restrictions herein are reasonable both as to numbers of demonstrators and the use of amplified sound equipment in the immediate area.

Balancing the interests at stake herein, the police restrictions upon pick-

eting and amplified noise in the immediate vicinity of the Soviet Mission clearly pass constitutional muster, certainly so far as concerns a demand for provisional relief. The restrictions at issue do not unduly or unnecessarily abridge the exercise of the plaintiff's members' liberty of expression in this area. They are reasonably narrow enough so as to afford the right of demontrators to express their views in number and noise sufficient to carry their message without unreasonable impediment. The numerical restrictions have been sufficiently time-tested over the years, without any apparent swell of complaint thereof and it may be reasonably inferred that no really undue restraints are felt by those inclined to demonstrate for their causes against the Mission. This conclusion does not suggest in any way that the motivation of the plaintiff

and its members is other than laudable and their intentions peaceful.

Accordingly the plaintiff's motion for a preliminary injunction is denied. The application of the United States for leave to appear as an amicus curiae in this action, because of the governmental interest herein, is granted.

The foregoing shall constitute the findings of fact and conclusions of law required by Federal Rule of Civil Procedure 52(a).

SO ORDERED.

Appendix C

The United States Constitution

AMENDMENT I [1791].

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV [1868].

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix D

18 U.S.C. § 112

§ 112. Protection of foreign officials, offi ial guests, and internationally protected persons

(a) Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official, official guest, or internationally protected person or makes any other violent attack upon the person or liberty of such person, or if likely to endanger his person or liberty, makes a violent attack upon his official premises, private accommodation, or means of transport or attempts to commit any of the foregoing shall be fined not more than $5,000 or imprisoned not more than three years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be fined not more than $10,000 or

imprisoned not more than ten years, or both.

(b) Whoever willfully--

(1) intimidates, coerces, threatens, or harasses a foreign official or an official guest or obstructs a foreign official in the performance of his duties;

(2) attempts to intimidate, coerce, threaten, or harass a foreign official or an official guest or obstruct a foreign official in the performance of his duties; or

(3) within the United States but outside the District of Columbia and within one hundred feet of any building or premises in whole or in part owned, used, or occupied for official business or for diplomatic, consular, or residential purposes by--

(A) a foreign government, including such use as a mission to an international organization;

(B) an international organization;

(C) a foreign official; or

(D) an official guest;

congregates with two or more other persons with intent to violate any other provision of this section;

shall be fined not more than $500 or imprisoned not more than six months, or both.

(c) For the purpose of this section "foreign government", "foreign official", "internationally protected person", "international organization", and "official guest" shall have the same meanings as those provided in section 1116(b) of this title.

(d) Nothing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed

under the first amendment to the Constitution of the United States.

(e) If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title and section 101(34) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(34)).

(f) In the course of enforcement of subsection (a) and any other sections prohibiting a conspiracy or attempt to vio-

late subsection (a), the Attorney General may request assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary, notwithstanding.

As amended Oct. 24, 1972. Pub. L. 92-539, Title III, § 301, 86 Stat. 1072; Oct. 8, 1976, Pub. L. 94-467, § 5, 90 Stat. 1999; Nov. 9, 1977, Pub. L. 95-163, § 17(b)(1), 91 Stat. 1286; Oct. 24, 1978, Pub. L. 95-504, § 2(b), 92.

Appendix E

Administrative Code of the City of New York § 435-6.0

§ 435-6.0* Regulation of sound devices or apparatus.-a. Legislative declaration. It is hereby declared that the use or operation of any radio device or apparatus or any devise or apparatus for the amplification of sounds from any radio, phono-

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*Section 3 of L. L. 1948, No. 64, reads as follows:

§3. Construction Clause.-If any part of this local law or the application thereof to any person or circumstances, shall for any reason be adjudged by a court of competent jurisdiction to be unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remainder of this local law or the application thereof to other perons and circumstances, but shall be confined in its operation to the section, subdivision, sentence or part of the local law and the persons and the circumstances directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the Council that this local law would have been adopted if such invalid section, provision, subdivision, sentence or part of the local law or application not been included.

graph or other sound-making or sound-producing device, or any device or apparatus for the reproduction or amplification of the human voice or other sounds, in front of or outside of any building, place or premises, or in or through any window, doorway or opening of such building, place or premises, abutting or adjacent to a public street, park or place, or in or upon any vehicle operated, standing or being in or upon any public street, park or place, where the sounds therefrom may be heard upon any public street, park or place, or from any stand, platform or other structure, or from any airplane or other device used for flying, flying over the city, or on a boat or on the waters within the jurisdiction of the city, or anywhere on or in the public streets, parks or places, is detrimental to the health, welfare and safety of the inhabi-

tants of the city, in that such use or operation diverts the attention of pedestrians and vehicle operators in the public streets, parks and places, thus increasing traffic hazards and causing injury to life and limb. It is hereby further declared that such use or operation disturbs the public peace and comfort and the peaceful enjoyment by the people of their rights to use the public streets, parks and places for street, park and other public purposes and disturbs the peace, quiet and comfort of the neighboring inhabitants. Therefore, it is hereby declared as a matter of legislative determination that the prohibition of such use or operation for commercial or business advertising purposes and the proper regulation of such use and operation for all other purposes is essential to protect the health, welfare and safety of the inhabitants of the city, to

secure the health, safety, comfort, convenience, and peaceful enjoyment by the people of their rights to use the public streets, parks and places for street, park and public purposes and to secure the peace, quiet and comfort of the city's inhabitants. It is hereby further declared as a matter of legislative determination that the expense of supervising and regulating the use and operation of such sound devices and apparatus for purposes other than commercial and business advertising purposes should be borne by the persons using or operating such devices and apparatus and that the requirement of a nominal fee for the issuance of a permit for such use and operation as hereinafter prescribed is intended to defray the expenses of regulating such use or operation for the health, welfare and safety of all the people.

b. Definitions. As used in this section:

1. The term "sound device or apparatus" shall mean any radio device or apparatus, or any device or apparatus for the amplification of any sounds from any radio, phonograph, or other sound-making or sound-producing device, or any device or apparatus for the reproduction or amplification of the human voice or other sounds;

2. The phrase "to use or operate any sound device or apparatus in, on, near or adjacent to any public street, park or place," shall mean to use or operate or cause to be used or operated any sound device or apparatus in front or outside of any building, place or premises, or in or through any window, doorway or opening of such building,

place or premises, abutting on or adjacent to a public street, park or place, or in or upon any vehicle operated, standing or being in or on any public street, park or place, where the sounds therefrom may be heard upon any public street, park or place, or from any stand, platform or other structure, or from any other airplane or other device used for flying, flying over the city, or on a boat or on the waters within the jurisdiction of the city, or anywhere on the public streets, parks or places.

c. Use and operation of the sound devices and apparatus for commercial and business advertising purposes. It shall be unlawful for any person to use or operate any sound device or apparatus in, on, near or adjacent to any public street,

park or place, for commercial and business advertising purpose.

d. Use and operation of sound devices and apparatus for other than commercial and business advertising purposes; permit required. It shall be unlawful for any person to use or operate any sound device or apparatus, in, on, near or adjacent to any public street, park or place, unless he shall have first obtained a permit to be issued by the commissioner in the manner hereinafter prescribed and unless he shall comply with the provisions of this section and the terms and conditions prescribed in such permit.

e. Applications.-Each applicant for a permit to use or operate a sound device or apparatus in, on, near or adjacent to any public street, park or place shall file a written application with the commissioner, at the police precinct covering the area

in which such sound device or apparatus is to be used or operated, at least five days prior to the date upon which such sound device or apparatus is to be used or operated. Such application shall describe the specific location in which such sound device or apparatus is proposed to be used or operated, the day and the hour or hours during which it is proposed to be used or operated, the volume of sound which is proposed to be used measured by decibels or by any other efficient method of measuring sound, and such other pertinent information as the commissioner may deem necessary to enable him to carry out the provisions of this section.

f. Issuance of permit; terms.-The commissioner shall not deny a permit for any specific time, location or use, to any applicant who complies with the provisions of this section, except for one or more of

the reasons specified in subdivision g hereof or for non-payment of the fee prescribed in subdivision h hereof, or to prevent over-lapping in the granting of permits. Each permit issued pursuant to this section shall describe the specific location in which such sound device or apparatus may be used or operated thereunder, the exact period of time for which such apparatus or device may be operated in such location, the maximum volume of sound which may be employed in such use or operation and such other terms and conditions as may be necessary, for the purpose of securing the health, safety, comfort, convenience and peaceful enjoyment by the people of their right to use the public streets, parks or places for street, park or other public purposes, protecting the health, welfare and safety of the inhabitants of the city, and securing the peace,

quiet and comfort of the neighboring inhabitants.

g. Special restrictions.-The commissioner shall not issue any permit for the use of a sound device or apparatus:

1. In any location within five hundred feet of a school, courthouse or church, during the hours of school, court or worship, respectively, or within five hundred feet of any hospital or similar institution;

2. In any location where the commissioner, upon investigation, shall determine that the conditions of vehicular or pedestrian traffic or both are such that the use of such a device or apparatus will constitute a threat to the safety of pedestrians or vehicular operators;

3. In any location where the commissioner, upon investigation, shall

determine that conditions of overcrowding or of street repair or other physical conditions are such that the use of a sound device or apparatus will deprive the public of the right to the safe, comfortable, convenient and peaceful enjoyment of any public street, park or place for street, park or other public purposes, or will constitute a threat to the safety of pedestrians or vehicle operators;

4. In or on any vehicle or other device while it is in transit; or

5. Between the hours of ten p.m. and nine a.m.

h. Fees.-Each applicant for a permit issued under the provisions of this section shall pay a fee of five dollars for the use of each sound device or apparatus for each day, provided, however, that permits for the use of such sound devices or

apparatus shall be issued to any bureau, commission, board or department of the United States government, the state of New York, and the city of New York, without fee.

i. The provisions of this section shall not apply to the use or operation of any sound device or apparatus by any church or synagogue on or within its own premises, in connection with the religious rites or ceremonies of such church or synagogue.

j. Violations.-Any person who shall violate any provision of this section, upon conviction thereof, shall be punished by a fine of not more than twenty-five dollars or imprisonment for thirty days, or both.

k. Rules and regulations.-The commissioner shall have the power to make such rules and regulations as may be necessary

to carry out the provisions of this section.

(As amended by L. L. 1939, No. 172, November 20; as renumbered by L. L. 1942, No. 50, October 29; and as amended by L. L. 1948, No. 64, October 1.)

Appendix F

New York City Charter § 435

§ 435. Department; duties.-a. The police department and force shall have the power and it shall be their duty to preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful or dangerous assemblages and assemblages which obstruct the free passage of public streets, sidewalks, parks and places; protect the rights of persons and property, guard the public health, preserve order at elections and all public meetings and assemblages; subject to the provisions of law and the rules and regulations of the commissioner of traffic, regulate, direct, control and restrict the movement of vehicular and pedestrian traffic for the facilitation of traffic and the convenience of the public as well as

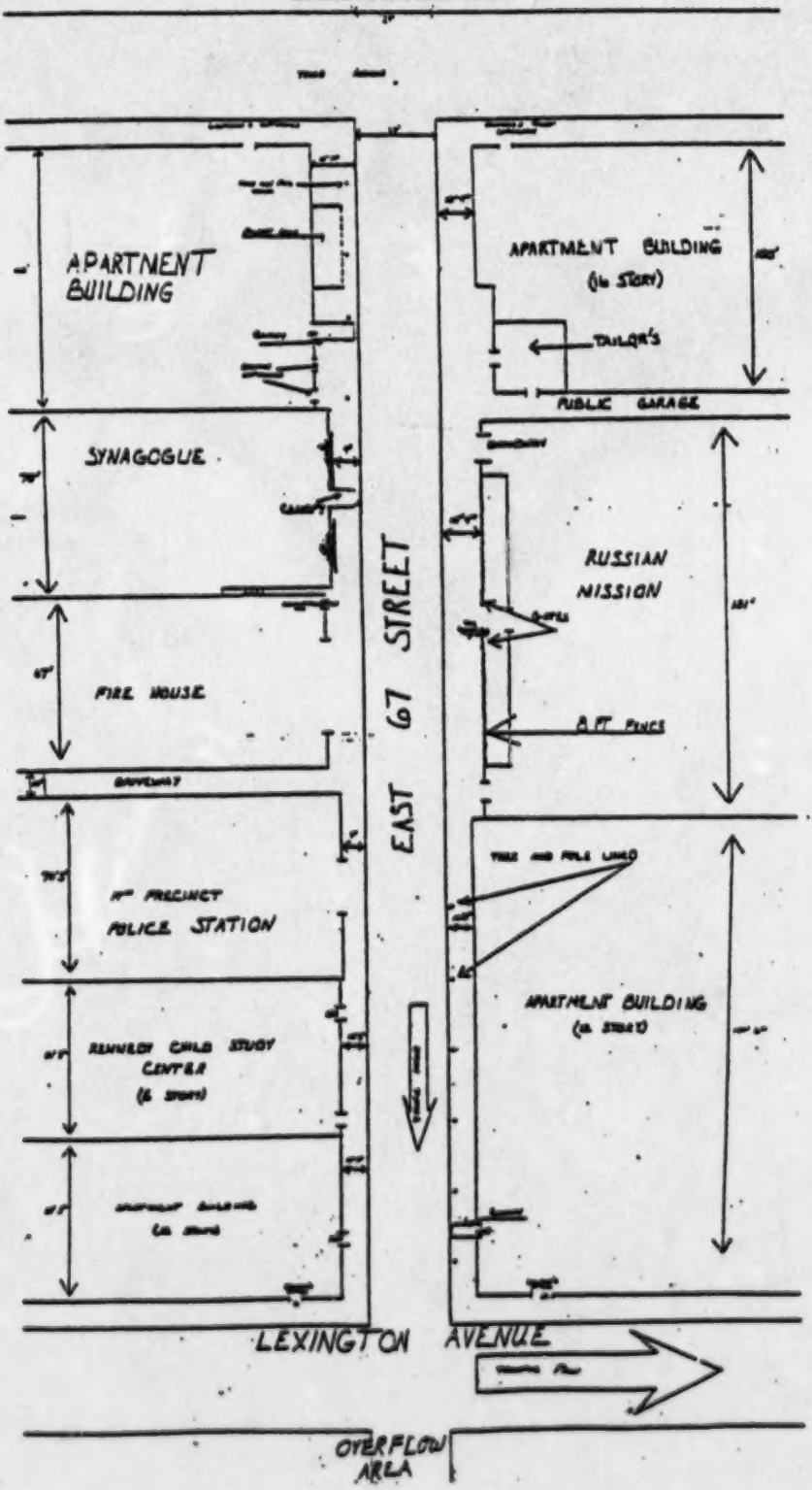
the proper protection of human life and health; remove all nuisances in the public streets, parks and places; arrest all street mendicants and beggars; provide proper police attendance at fires; inspect and observe all places of public amusement, all places of business having excise or other licenses to carry on any business; enforce and prevent the violation of all laws and ordinances in force in the city; and for these purposes to arrest all persons guilty of violating any law or ordinance for the suppression or punishment of crimes or offenses.

b. Except as specifically provided herein, nothing contained in this section shall be deemed to limit, restrict, divest, transfer or supersede the powers or the jurisdiction of any agency as defined in section eleven hundred fifty of the charter.

c. Nothing contained in this charter shall be deemed to grant the department of traffic cognizance or control over the government, administration, disposition and discipline of the police department or police force.

(Derived from former § 435 as amended by L. L. 1949, No. 2; as amended by L. L. 1950, No. 27.)

Appendix G


APARTMENT BUILDING
SYNAGOGUE
FIRE HOUSE
19th PRECINCT POLICE STATION
KENNEDY CHILD STUDY CENTER
APARTMENT BUILDING (16 STORY)
TAILOR'S
PUBLIC GARAGE
RUSSIAN MISSION
6 FT FENCE
APARTMENT BUILDING
EAST 67 STREET
LEXINGTON AVENUE
OVERFLOW AREA